(1) 88-1247

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1988

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,

vs.

NATIONAL FARMERS ORGANIZATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Respondent National Farmers Organization (NFO) is organized for the purpose of exercising market power on behalf of its dairy farmer members to increase the price they receive from the sale of their raw milk. It operates, nationally, as a marketing agent for producers of milk and other agricultural products. The Court of Appeals held that NFO suffered "antitrust injury" in the form of lost future membership dues and marketing fees from dairy farmers whom NFO failed to attract as members by reason of a conspiracy engaged in by petitioner and other dairy farmer cooperatives to monopolize a ten state area of the Midwest which was never proven to constitute a relevant market under the Sherman Act. Two basic questions of antitrust law are presented:

1. Whether a national non-profit collective bargaining association of farmers which claims the right to engage in horizontal price-fixing on behalf of its members by reason of an antitrust exemption conferred by §6 of the Clayton Act, 15 U.S.C. §17 and the Capper-Volstead Act, 7 U.S.C. §291, suffers "antitrust injury" when its future membership dues and marketing fees income is allegedly reduced by a conspiracy which interferes with the association's membership growth?

2. Whether proof of a properly defined relevant geographic market is necessary to show market power in a conspiracy to monopolize claim under § 2 of the Sherman Act or a Rule of Reason conspiracy to restrain trade under §1?

Petitioner also adopts two additional questions presented to the Court in a petition being filed by co-petitioners Associated Milk Producers, Inc. and Mid-America Dairymen. The two additional questions presented, arising out of the opinions below, are:

1. Whether the established antitrust principle that the fact-finder may make a "just and reasonable estimate of the damage" caused by an antitrust violation:

(a) permits an antitrust plaintiff to prove the evidentiary basis for its damage estimate by less than "a preponderance of the evidence";

(b) allows an appellate court to shift to the defendant the burden of proof as to the measure of the plaintiff's damages; and

(c) permits an antitrust plaintiff to rely upon a damage theory that fails to exclude the effects of significant lawful competition?

2. Whether there is an "antitrust damages" exception to Rule 52(a) that permits an appellate court, based on its holding that the district court's findings rested on an "inappropriate legal standard" of proof, to review the record *de novo*, make its own witness credibility assessments and factual findings, and mandate an award of substantial damages, rather than remanding the case to the district court to reconsider its findings under the standard articulated by the appellate court?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 28.1, Counsel for Petitioner certify that the following is a complete list of all parties to the proceedings below:

Associated Milk Producers, Inc., Mid-America Dairymen, Central Milk Producers Cooperative and National Farmers Organization.

Petitioner Central Milk Producers Cooperative has no parent or subsidiaries and has the following members as affiliates:

Alto Cooperative Creamery
Waupun, Wisconsin

Associated Milk Producers, Inc.
Schaumburg, Illinois

Golden Guernsey Dairy
Cooperative
Milwaukee, Wisconsin

Greenwood Milk Products
Cooperative
Greenwood, Wisconsin

Independent Milk Producers
Cooperative
Slinger, Wisconsin

Lake to Lake Dairy
Cooperative, Division of
Land O' Lakes, Inc.
Manitowoc, Wisconsin

Manitowoc Milk Producers
Cooperative
Manitowoc, Wisconsin

Mid-West Dairymen's
Cooperative
Rockford, Illinois

Milwaukee Cooperative
Milk Producers
Brookfield, Wisconsin

Outagamie Producers
Cooperative
Black Crook, Wisconsin

Pine Rivers Farmers Dairy
Cooperative
Merrill, Wisconsin

Southern Milk Sales, Inc.
Jefferson, Wisconsin

Wisconsin Dairies
Cooperative
Baraboo, Wisconsin

Woodstock Progressive
Milk Producers
Woodstock, Illinois

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NATIONAL FARMERS ORGANIZATION,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Central Milk Producers Cooperative (CMPC), respectfully requests that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Eighth Circuit entered in this matter on July 5, 1988 which reversed the decision of the United States District Court for the Western District of Missouri denying an award of damages to the respondent National Farmers Organization (NFO) under §4 of the Clayton Act.

OPINIONS BELOW

The opinion of the Court of Appeals reversing the district court's judgment denying NFO's claim for damages is published as *National Farmers' Organization, Inc. v. Associated Milk Producers, Inc., et al.*, 850 F.2d 1286 (8th Cir. 1988) (3a-59a). The opinion of the district court denying NFO's damage claim is published at 614 F.Supp. 745 (D.C. Mo. 1985) (65a-230a). The prior opinion of the Court of Appeals reversing and remanding for determination of damages the district court's prior decision dismissing NFO's antitrust claims is reported at 687 F.2d 1173 (8th Cir. 1982) (231a-296a). The district court's prior opinion dismissing NFO's §§1 and 2 Sherman Act claims is reported as *In re Midwest Milk Monopolization Litigation*, 510 F.Supp. 381 (W.D. Mo. 1981) (297a-602a).*

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit reversing and remanding the case to the district court for further proceedings was entered on July 5, 1988. (61a-62a). A timely petition for Rehearing and Suggestions for Rehearing *En Banc* was denied on September 13, 1988. (63a).** By Justice Blackmun's December 3, 1988 Order the time for filing this petition was extended to January 26, 1989. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

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* The Court of Appeals has designated the three prior opinions, 510 F.Supp. 381; 687 F.2d 1173 and 614 F.Supp. 745, as NFO I, II and III respectively. 850 F.2d at 1289, 5a. That designation, with the addition of 850 F.2d as NFO IV, will be followed *infra*.

** Judges Bowman and Magill would have granted the Petition.

STATUTES INVOLVED

Respondent's complaint alleges violations of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1,2, and the case involves §§4 and 6 of the Clayton Act, and the Capper-Volstead Act 7 U.S.C. §§291-292. Relevant portions of the statutory provisions involved are reproduced in the separately bound Appendix at 1a-2a.

STATEMENT OF THE CASE

This 17 year old court tried case, twice appealed to the Eighth Circuit, arises out of competition for dairy farmer membership between respondent NFO, a national collective bargaining association of farmers, and three "Capper-Volstead" cooperative milk marketing associations.* The Eighth Circuit determined that, notwithstanding NFO's failure to prove a "relevant geographic market" (NFO II, 258a-259a) or anticompetitive effect in any market, petitioner CMPC, Mid-America Dairymen, Inc. (Mid-Am) and Associated Milk Producers, Inc. (AMPI) were guilty of a conspiracy to monopolize the sale of raw milk in the "ten-state midwestern region" where NFO operated by stunting NFO's membership growth causing it to lose future membership dues and marketing fees from potential dairy farmer members whom NFO failed to attract. (NFO IV, 4a, 24a-33a, 57a).

This petition raises the issue of whether the Eighth Circuit was wrong in concluding: *first*, that the antitrust laws provide a damage remedy for losses which weaken a seller's power to fix prices or achieve market power, and *second*, that

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* Jurisdiction in the district court was invoked by claimants and counterclaimants under 28 U.S.C. §1337, and 15 U.S.C. §§15 and 26.

"relevant geographic market" proof is not a necessary element of a Section 2 Sherman Act conspiracy to monopolize claim and a Section 1 non-*per se* claim.

1. The Parties. Respondent NFO is a nationwide farm bargaining organization incorporated as a non-profit membership corporation under Iowa law. Originally organized in 1955 as a protest and lobbying organization against federal agricultural policy, it amended its articles of incorporation in 1957 to add as its purpose collective bargaining "on a non-pecuniary basis for prices, terms and conditions of sale" of its members' farm products. (NFO I, 308a; NFO II, 235a.) NFO's avowed purpose is to "unite into one organization . . . all farmers engaged in the production of agricultural commodities" (NFO II, 308a) and thereby to exercise sufficient market power to raise commodity prices paid to farmers. (NFO II, 235a).[1] To obtain the price it desires, NFO's bargaining strategy has included picketing and "holding actions" comparable to a strike in the labor field. (NFO I, 310a).

NFO receives member dues and "checkoff" fees from the proceeds of the sale of its members' farm products. In the case of milk such proceeds are paid by the buyer to an "NFO Dairy Trust" which, in turn, deducts and remits to NFO such dues and "checkoff" as the member has authorized to defray NFO's collective bargaining expense. (NFO II, 243a, 293a-294a; NFO I, 324a)[2]

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[1] NFO's objective is to "block or unite enough production under control of [its] members so that those members can . . . name their price, and if the price wasn't paid, to hold the production." (NFO I, 348a).

[2] NFO is organized in such a way that it has no earnings or net income from the sale of its members' milk. (NFO I, 309a). In 1957 the IRS ruled NFO to be exempt from federal income tax as a non-profit membership organization pursuant to I.R.C. §501(c)(5).

Mid-Am and AMPI are both cooperative associations of dairy farmers engaged in collectively marketing the milk of their members to "handlers" who operate fluid milk bottling plants throughout the Midwestern region of the United States. Petitioner CMPC is a federated cooperative marketing agent for fourteen dairy cooperatives whose dairy farmer members, located principally in Wisconsin, supply milk to handlers regulated under Federal Milk Order No. 30 (7 CFR Part 1030) which regulates the handling of milk in a geographic area described as the "Chicago Regional Marketing Area". 7 CFR §1030.2. (NFO II, 235a, 262a-263a).

2. The District Court Proceedings. Mid-Am began this case in 1971 when it filed an antitrust treble damage action against NFO alleging that NFO violated §1 of the Sherman Act by engaging in illegal price-fixing in the sale of its members' raw milk and promoting a group boycott of Mid-Am among dairy farmers including Mid-Am's own members. (NFO II, 236a). NFO filed an antitrust counterclaim against Mid-Am, AMPI and CMPC as counterclaim defendants. AMPI then counterclaimed against NFO alleging the same price-fixing claims asserted by Mid-Am plus claims for attempted monopolization and violations of the Agricultural Fair Practices Act. 7 U.S.C. §§2301-2307. (*Ibid.*).[3]

NFO's counterclaim alleged that CMPC, AMPI and Mid-Am monopolized, attempted to monopolize and conspired to monopolize and restrain trade in the marketing of raw milk in violation of the Sherman Act in a "ten state region" of the

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[3] Mid-Am's case against NFO (Phase I), NFO's counterclaim (Phase II) and AMPI's counterclaim (Phase III) were tried separately to the court. (NFO I, 301a). The district court's Phase I and III judgments in favor of NFO were affirmed on appeal. (NFO II, 250a, 256a).

Midwest or "ten federal order markets therein" [4] (NFO II, 258a). NFO claimed that the three cooperatives acted to depress the price received by NFO members for the sale of their milk and to stifle NFO's growth by depriving its members of access to milk buyers in various markets of the Midwest. (NFO II, 261a-264a). NFO claimed damages totaling $14,064,068, consisting of $12,851,000 of "lost [market] penetration damages" attributable to unrealized member dues and "checkoff" fees from stifled growth and $1,213,000 of "price reduction damages" allegedly suffered by its members. (NFO I, 301a, 404a n.27; *see* NFO II, 291a-292a).

NFO's "Phase II" counterclaim, tried to the court over an eighteen month period (NFO II, 256a) [5] in a trial consisting of 75 live witnesses, excerpts from over 100 depositions, 4800 exhibits and over 15,000 pages of transcript (NFO II, 233a), resulted in a judgment dismissing NFO's antitrust claims. The district court made the "ultimate determination that . . . NFO failed to carry the burden of proof in regard to all Phase II issues necessary to establish liability on the part of counterclaim defendants." (NFO I, 403a). The court specifically found that NFO failed to prove a properly defined relevant geographic market and that the defendant cooperatives did not monopolize, attempt or conspire to monopolize or restrain the marketing of raw milk in any properly defined market. (NFO I, 548a-549a).

Though petitioner CMPC had urged from the outset that NFO lacked standing to sue for alleged "price reduction"

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[4] A "federal order market" is a defined geographic area in which the marketing of raw milk delivered by producers and processed and sold by "handlers" is regulated by the Secretary of Agriculture. (NFO I, 420a).

[5] The case was "pretried" over a six year period with trial commencing in November, 1977.

damages suffered by its members or for the loss of membership dues or marketing fees, the district court concluded that it was unnecessary to reach the question of whether "NFO may not have standing to maintain this action" or "whether NFO's 'reduced price' and 'market penetration' damage claims may be speculative, conjectural and not legally permissible". (NFO I, 550a).

3. The First Court of Appeals Proceedings. On appeal, the Eighth Circuit affirmed the district court's Phase II [6] dismissal of NFO's actual and attempted monopolization claim because of NFO's failure to show that the defendant cooperatives had, or were in danger of achieving, "monopoly power in a properly defined market or submarkets" (NFO II, 259a) but reversed as to the conspiracy to monopolize claim, however, on the grounds that "relevant market is not a necessary element of such a claim because actual attainment or 'dangerous probability' of monopoly power are not at issue". (NFO II, 260a). The court then resurrected the plaintiff's Section 1 claim which had been tried under the Rule of Reason, concluding that "an unlawful conspiracy under Section 2 necessarily violates Section 1 as an 'unreasonable' restraint of trade." (*Ibid.*). The Court of Appeals never found that defendants' conduct caused an anticompetitive effect in any relevant geographic market.

According to the Eighth Circuit, a Section 2 claim for conspiracy to monopolize does not require proof of a relevant market "because the essential elements of a Section 2 conspiracy claim are concerted action and specific intent to mo-

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[6] The Eighth Circuit also affirmed dismissal of Mid-Am's and AMPI's Phase I and II claims but on different grounds. The Court of Appeals concluded that NFO engaged in horizontal price-fixing but held that its price-fixing on behalf of its members was exempt conduct under the Capper-Volstead Act. (NFO II, 241a-250a, 256a).

nopolize, such that it need only be further shown that the conspiracy affected 'some appreciable part of interstate commerce.' *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1971). . . ." (NFO II, 238a).

As to petitioner's argument that NFO lacked standing to maintain the action (which the district court failed to address), the Eighth Circuit agreed that NFO lacked standing to recover "price reduction" damages suffered by its members (NFO II, 292a) but held that NFO could recover lost membership dues and fees because such losses "represent direct injury to NFO in its 'business or property'." (NFO II, 293a). The court remanded "for a determination of the amount of damages NFO may recover" (NFO II, 233a) with instructions that the district court "may . . . conduct such further proceedings and make such new findings as may be appropriate to ensure that the determination of damages . . . can be made consistent with this opinion." (NFO II, 296a). Appellees' petition for rehearing *en banc* and suggestions for rehearing by the panel was denied (603a) and this Court denied CMPC's petition for certiorari to review the questions presented by this petition. (461 U.S. 937).[7]

4. *Proceedings On Remand.* On the basis of this Court's intervening decision in *Associated General Contractors v. Carpenters*, 459 U.S. 519 (1983) (*AGC*), petitioner CMPC

[7] The denial of certiorari does not preclude its grant at a later time so long as the case remains *sub judice*, and the decision of the Court of Appeals on the first appeal remains open for review by this Court though it may have been followed as the law of the case by the district court on remand and on the second appeal. *Christianson v. Colt*, —— U.S. ——, 108 S. Ct. 2166, 2178 (1988) ("A petition for writ of certiorari can expose the entire case to review"); *Indianapolis v. Chase National Bank*, 314 U.S. 63, 72, 75 (1941); *Hamilton Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1961).

and the other counterclaim defendants renewed their motion to dismiss NFO's damage claim on the grounds that application of the multifactor antitrust standing analysis mandated by *AGC*[8] precluded recovery by NFO of lost future membership dues and marketing fees from dairy farmer members whom NFO failed to attract by reason of counterclaim defendants unlawful conduct. The district court denied the motion, stating that "contrary to defendants basic contention . . . the Supreme Court did not make any substantial change in antitrust law when it handed down *AGC*". (NFO III, 69a).

As to its pursuit of the $14 million damage claim before the district court on remand "NFO elected not to adduce any new or additional evidence . . . but instead rel[ied] upon the evidence adduced and the theories originally advanced at trial." (NFO III, 82a). Following extensive briefing on the existing trial record and oral argument on the damage issues, the district court rejected NFO's damage expert's testimony as not "credible" and concluded that any award of damages to NFO "would necessarily be based on speculation and conjecture." (NFO III, 153a).

5. *The Second Appeal.* On appeal, the Eighth Circuit affirmed the district court's determination that the law of antitrust standing articulated by this Court's *AGC* decision did not preclude recovery of lost membership dues and marketing fees by NFO. (NFO IV n.4, 12a-13a).

As to the district court's rejection of NFO's "test market" or "yardstick" damage theory, the Eighth Circuit reversed and remanded the case to the district court with directions to accept NFO's "test market" theory "as a valid base from

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[8] "In our view, courts should analyze each situation [whether a party injured by an antitrust violation may recover treble damages] in light of the factors set forth in the text *infra*." 459 U.S. at 456 n.33.

which to determine the amount of damages and shall use the $7,403,374 claimed under the theory as a starting point" (NFO IV, 57a) reduced by approximately $2.3 million to reflect certain disallowed items and subject to further reduction, in the district court's discretion, to reflect "the effects of unlawful conduct later found to be lawful." (NFO IV, 58a).

REASONS FOR GRANTING THE WRIT

This case presents a clear-cut legal question concerning the meaning of the term "antitrust injury" as articulated by this Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)[9]—a question that has been "characterized by doctrinal confusion" [10] that this Court's later decisions in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) and *AGC, supra* 459 U.S. 519 have failed to resolve.[11]

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[9] "The single most striking development in the law of private antitrust enforcement, since . . . 1978 is the antitrust injury concept associated with the Supreme Court's *Brunswick* decision, which held that the antitrust laws compensate only injury related to the goals or purpose of the federal antitrust laws." P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶334.2a at 300 (Supp. 1988).

[10] *In re Industrial Gas Litigation*, 681 F.2d 514, 515 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983).

[11] *See e.g. Jack Walters & Sons Corp. v. Morton Builders, Inc.*, 737 F.2d 698, 708-709 (7th Cir.) *cert. denied*, 469 U.S. 1018 (1984) (denying standing to a retailer who alleges injury from a non-predatory vertical maximum price agreement among his competitors and their supplier); *contra, USA Petroleum v. Atlantic Richfield Co.*, 859 F.2d 687, 697 (9th Cir. 1988). *See also, Adams v. Pan American World Airways*, 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1109 (1988) and *Industrial Gas Litigation, supra* (denying standing to employees whose loss did not reflect an injury from a restraint in product market competition which formed the basis of defendant's violation); *contra, Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982) vacated in light of *AGC, supra*, 460 U.S.

The decision below warrants review to instruct the lower courts that §4 of the Clayton Act does not authorize recovery "for losses which are of no concern to the antitrust laws", *Brunswick, supra,* 429 U.S. at 487; that the purpose of the antitrust treble damage remedy is to compensate for losses stemming from restraints on competition in the relevant product market that increase price, reduce output and injure consumers,[12] and that derivative or consequential loss traceable to an antitrust violation is insufficient to support a treble damage recovery under §4 of the Clayton Act. (Point I).

The decisions below warrant review, also, to resolve a clear conflict among the circuits concerning the need for proof of a relevant geographic market in which to assess an anticompetitive effect in order to support a claim of injury to competition in a Rule of Reason case under §1 or conspiracy to monopolize case under §2 of the Sherman Act. (Point II).

1007 (1983); reinstated on remand, 740 F.2d 739 (9th Cir. 1984) (Kennedy J. dissenting), *cert. dismissed,* 469 U.S. 1200 (1985) and *Donahue v. Pendelton Woolen Mills,* 633 F.Supp. 1423 (D.C.N.Y. 1983) (granting standing). "Unfortunately the law of [antitrust] standing is not much clearer after *Associated* and *McCready* then it was before." P. Areeda & H. Hovenkamp, *Antitrust Law,* ¶334.1b at 299 (Supp. 1988). *See also* Page, *Antitrust Damages and Economic Efficiency: An Approach To Antitrust Injury,* 47 U. Chi. Law Rev. 467 (1980): "Courts and commentators . . . have developed no coherent theory to guide the application of the antitrust injury doctrine in the award of damages for antitrust violations." (*Id.* at 467).

[12] "Congress designed the Sherman Act as a 'consumer welfare prescription'." *Reiter v. Sonotone,* 442 U.S. 330, 343 (1979); R. Bork, *The Antitrust Paradox* (1978) at 51: "The antitrust laws, as they now stand, have only one legitimate goal . . . the maximization of consumer welfare; therefore, . . . '[c]ompetition' must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree."

I. CERTIORARI SHOULD BE GRANTED TO INSTRUCT THE LOWER COURTS THAT THE ANTITRUST TREBLE DAMAGE REMEDY IS INTENDED TO COMPENSATE FOR LOSS RESULTING FROM ANTICOMPETITIVE CONDUCT THAT REDUCES OUTPUT OR RAISES PRICES TO CONSUMERS IN THE RELEVANT MARKET

In ordering a treble damage award to respondent NFO to compensate for its claimed loss of future membership dues and marketing fees the Eighth Circuit has ignored this Court's admonition that when a plaintiff's antitrust standing is challenged, the focal issue is the nature of the damages sought to be recovered and the relation of the claimed injury to the market restrained by defendant's antitrust violation. *AGC, supra* at 538. NFO seeks to recover

> [D]amages resulting from NFO's having been prevented from achieving the growth in its dairy program in the Midwest market which it would have achieved but for the conspiracy . . . . This failure to achieve market penetration has resulted in . . . (1) lost dues which NFO would have collected, (2) lost check-off revenues for milk which NFO would have but did not market. . . .[13]

The relevant product market which the Eighth Circuit concluded that petitioner, Mid-Am and AMPI conspired to restrain was the marketing of Grade A raw milk to independent buyers or "handlers" in a ten state Midwest region where NFO solicited dairy farmer membership. (NFO II, 257a, 261a-264a). The Eighth Circuit held that losses in the form of "price reduction" damages — forced by defendants' competi-

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[13] NFO Narrative Statement and Legal Brief Re Damages at 1399-1400, June 30, 1975. (App. I, 607a).

tion and reduced sales of milk to the "coerced" buyers — were suffered by and belong to NFO's members, not NFO. (NFO II, 292a). After noting that "[t]he price reduction issue may be relevant to NFO's damages in that by virtue of selling at lower prices, NFO may have lost members or, in turn, marketing volume" *(ibid.)*, the Eighth Circuit held that NFO was entitled to recover as antitrust damages "lost fees and dues from those who stopped marketing through NFO" because "NFO, as a competitor, was a direct target of the unlawful conspiracy." (NFO II, 293a).

1. This Court has held that more must be shown to warrant recovery of antitrust damages than that a plaintiff, "as a competitor, was a direct target of the unlawful conspiracy." In *AGC*, this Court held that the plaintiff Union's right to recover damages for injury allegedly suffered by reason of the defendant's coercive conduct directed against contractors and developers who hired unionized firms "cannot be answered simply by reference to the broad language of § 4. Instead, . . . the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." 459 U.S. at 535. The Court noted that "the Union's allegation of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as at matter of law." 459 U.S. at 545.[14]

While the nature of the Union's injury in *AGC* was obscure (*id.* at 541 n.46), one theory of the Union's injury and damage discerned by this Court was that the defendant association of contractors illegally coerced the victim landowners to switch from union to non-union contractors employing non-union

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[14] *See Ostrofe v. H.S. Crocker, supra* at 751 Kennedy, J. dissenting.) ("Ostrofe's claim is within the square of this language and should be dismissed.")

workers thereby stunting the Union's membership growth with the result that "dues payments declined because its members lost jobs or wages". (*Ibid.*). Such damage, the Court said, is too "remote" and "indirect" to warrant recovery. *Ibid.*

In concluding that the plaintiff Union was not a person injured within the meaning of §4 of the Clayton Act, this Court directed the lower courts to "analyze each [§4 standing] situation in light of the factors set forth in the text . . ."*Id.* at 536 n.33.[15] Notwithstanding a plaintiff's demonstrated intended injury traceable to a defendant's antitrust violation, this Court said that §4 standing will be denied if: (1) the alleged injury is not the type the antitrust laws were intended to forestall (*id.* at 538-539); (2) there "is an identifiable class of" more directly injured antitrust victims "whose self interest would normally motivate them" to enforce the antitrust laws (*id.* at 542), or (3) the nature of plaintiff's claimed injury involves speculative or abstract damage theories (*id.* at 544), or a "tenuous and speculative . . . relationship between the . . . antitrust violation and [plaintiff's] alleged injury." (*Id.* at 545).

2. One salient principle that emerges from the *AGC* decision is the proposition, derived from and developed by the

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[15] The factors to be considered by the courts in assessing a plaintiff's antitrust standing are: (1) defendant's intent to injure the plaintiff (*id.* at 537); (2) the causal connection between the alleged violation and the nature of plaintiff's harm (*ibid.*); (3) whether the injury was of a type that Congress sought to redress under the antitrust laws (*id.* at 538-540); (4) the directness or indirectness between the injury and the market restraint (*id.* at 540-541); (5) whether the damages are speculative because the claimed injury "may have been produced by independent factors;" (*id.* at 541-542); (6) the risk of multiple or duplicative recoveries or complex damage apportionment (*id.* at 542-543); (7) the existence of more direct victims of the violation (*id.* at 542-545).

Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, supra,* that the antitrust treble damage remedy is intended to compensate for a loss resulting directly from a decrease in competition in the market restrained by defendant's antitrust violation. 459 U.S. at 538. This Court held, in *Brunswick* that to recover treble damages a plaintiff "must prove more than injury causally linked to an illegal presence in the market. Plaintiff must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." 429 U.S. at 489 (emphasis in original). The Eighth Circuit's holding that NFO was entitled to recover membership dues and marketing fees as antitrust damages cannot be squared with the "antitrust injury" concept described in *Brunswick.*

The Eighth Circuit concluded that petitioner's "unlawful conduct . . . in forcing NFO to lower prices" (NFO II, 292a) warranted recovery of antitrust damages in the form of lost membership dues and marketing fees because "by virtue of selling at lower prices, NFO may have lost members or, in turn, marketing volume." (*Ibid.*). That conclusion is fundamentally at odds with the *Brunswick* "antitrust injury" test which precludes a damage recovery for loss resulting from enhanced competition "even though such competition was caused by conduct violating the antitrust laws." P. Areeda & H. Hovenkamp, *Antitrust Law,* ¶334.2a at 301 (Supp. 1988)[16]; *cf., Jack Walters & Sons Corp. v. Morton Buildings, Inc.,* 737 F.2d 698, 708-709 (7th Cir.) *cert. denied,* 469 U.S. 1018 (1984) (holding that vertical maximum price-fixing

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[16] The authors explain that: "The last statement may seem contradictory, for it postulates that competition can be simultaneously impaired (thereby violating the antitrust laws) and enhanced (thereby causing the plaintiff non-cognizable losses). There is no real contradiction, because the impairment and enhancement lie in different temporal and market dimensions. . . ." *Ibid.*

resulting in lower prices to consumers does not constitute "antitrust injury").

3. NFO's loss of income in the form of dues and fees traceable to its "having been prevented from achieving the growth [in membership] . . . which it would have achieved but for the conspiracy" does not describe an "injury . . . of 'the type that the [Sherman Act] was intended to forestall'. . . ." *Brunswick, supra* at 487-488 (quoting *Wyandotte Co. v. United States,* 389 U.S. 191, 202 (1967)). An injury that does not flow directly from an interference with the Sherman Act's purpose of "assur[ing] customers the benefits of price competition" (*AGC, supra,* 459 U.S. at 538) does not meet the test of compensable antitrust injury under §4 of the Clayton Act.

NFO is organized for the purpose of acquiring membership sufficient to permit it to override competition and exercise collective bargaining power to fix prices of commodities sold by its members as authorized by the Capper-Volstead Act, 7 U.S.C. §291. (NFO II, 235a, 241a-243a). To award NFO antitrust damages because its price-fixing power was eroded by membership losses attributable to petitioner's conspiracy to monopolize stands the Sherman Act on its head. Awarding recovery to NFO for losses attributable to a weakening of its collective bargaining power would collide squarely with the holding in *Brunswick,* reaffirmed in *AGC* (459 U.S. at 540) that "[NFO] must prove *antitrust* injury which is to say injury of the type the antitrust laws were intended to prevent. . . ." *Brunswick, supra,* 429 U.S. at 489.

NFO's claim of lost dues of dairy farmers whom it failed to attract as members does not reflect damages as "a competitor in the market in which trade was restrained". *AGC, supra* 459 U.S. at 539. It describes indirect derivative injury

stemming from injury to NFO members in the marketing of milk from which NFO claims it suffered damage in the "membership market" for the sale of NFO's collective bargaining services—a national "market" in which NFO seeks to enhance the price received by its members for the sale of their farm products.

While NFO's fundamental purpose of organizing farmers so as to eliminate competition among them in selling their milk may be protected by §6 of the Clayton Act and the Capper-Volstead Act, from the sanctions of the Sherman Act, it does not follow that NFO is entitled to the affirmative protections of that Act and the remedies of §4 for injury which affects only its "organizational and representational activities" (*AGC, supra* at 526 n.10).[17] To award antitrust damages for a loss that diminishes a seller's ability to achieve market power to fix prices is fundamentally at odds with the "general principle that treble damage recoveries should be linked to the procompetition policy of the antitrust laws",

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[17] *Cf. AGC, supra* at 539 where Justice Stevens observed that "the Union's . . . primary . . . goal is not necessarily served . . . by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals. At common law—as well as in the early days of administration of the federal antitrust laws—the collective activities of labor unions were regarded as a conspiracy in restraint of trade. Federal policy has since developed . . . a broad labor exemption from the antitrust laws . . . to protect and encourage [their] organizational and representational activities. *Set against this background, a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect.* . . ." (Emphasis supplied). The agricultural cooperative antitrust exemption granted by §6 of the Clayton Act, 7 U.S.C. §17 (applicable to agricultural and labor organizations) has a similar historic origin. *Maryland & Virginia Milk Producers Assoc., Inc. v. United States*, 362 U.S. 458, 464 (1960).

McCready, supra, 457 U.S. at 482, and "authorize[s] damages for losses which are of no concern to the antitrust laws". *Brunswick, supra* at 487.

The "competition" that is of concern to the antitrust laws is the "competition that promotes the consumer interests that the Sherman Act aims to foster." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984). An injury that does not flow from "[r]estrictions on price and output [which] are the paradigmatic examples of restraints of trade" (*N.C.A.A. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984)) is of no concern to the antitrust laws.

4. The panel's holding that NFO has standing to recover dues and marketing fees as antitrust damages is premised on the assumption that a bargaining agency's "organizational and representational activities . . . [are] protected by the antitrust laws" (*AGC*, 459 U.S. at 525-526)—a notion that this Court rejected in *AGC* when it reversed the Ninth Circuit.[18]

This case provides the opportunity for the Court to consider and decide an issue which it acknowledged but left undecided in *AGC*: "whether the direct victim of a boycott who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is [alleged to be] to restrain competition in the relevant economic market." *AGC*, 459 U.S. at 540 n.44.

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[18] On the basis of *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176-1177 (5th Cir. 1976) and *International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n.*, 483 F.2d 384, 397-398 (3rd Cir. 1973), the Ninth Circuit had held that the plaintiff Union's "ability to attract membership and represent employees" were activities protected by the antitrust laws. *California State Council v. Associated General Contractors of California*, 648 F.2d 527, 539 (9th Cir. 1980) (Sneed, J. dissenting).

II. THE EIGHTH CIRCUIT'S DECISION DEMONSTRATES A MAJOR CONFLICT AMONG THE CIRCUITS ON WHETHER PROOF OF A RELEVANT GEOGRAPHIC MARKET IS NECESSARY IN A CONSPIRACY TO MONOPOLIZE CASE UNDER SECTION 2 OF THE SHERMAN ACT

There is a sharp and continuing conflict among the circuits as to whether proof of a relevant geographic market is necessary to sustain a conspiracy to monopolize claim under §2 of the Sherman Act. This case is a textbook example of how the antitrust laws may be misused when a private conspiracy to monopolize treble damage action under §2 is permitted to proceed without proof of defendents' power in a properly defined relevant geographic market.

It also demonstrates what can happen when antitrust jurisprudence is untethered from economic reality. Proceeding without a properly defined relevant geographic market makes it impossible to develop a non-speculative damage theory. It results in an incongruous and illogical distinction between a §1 Rule of Reason conspiracy (which all circuits agree requires proof of a relevant market or anticompetitive effect) and a §2 conspiracy which would condemn mere specific intent to monopolize with no requirement of proof of market power or anticompetitive effect. If permitted to stand, the Eighth Circuit's decision, and those circuits which it follows, would impede this Court's efforts to develop a consistent, market oriented antitrust jurisprudence under §§1 and 2 of the Sherman Act.

Certiorari should be granted to remove the conflicts among the circuits, compel adherence to the teachings of this Court and reverse the tendency of litigants to use the antitrust laws to remedy mere business tort conduct contrary to this Court's

admonition that to amount to an unreasonable restraint of trade, "predatory" conduct must have an effect greater than its effect on plaintiff's business because "the antitrust laws . . . were enacted 'for the protection of *competition* not *competitors.*'" *Brunswick Corp., supra,* 429 U.S. at 488. (Emphasis in the original (quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962)).

A. The Eighth Circuit's Decision Illustrates A Conflict Among The Circuits And With The Decisions Of This Court.

The Eighth Circuit's decision to dispense with proof of a relevant market in a §2 conspiracy to monopolize and Rule of Reason conspiracy case under §1 conflicts with the decisions of this Court and other circuits.

Today, the circuits are divided on the question of whether proof of a relevant geographic market is required in a §2 conspiracy to monopolize case. The Third, Fourth, Fifth, Eleventh and District of Columbia Circuits require proof of a relevant market for a conspiracy to monopolize claim under §2.[19] The Ninth, Tenth, Sixth, Second and possibly the Sev-

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[19] Third Circuit: *Fleer Corp. v. Topps Chewing Gum, Inc.,* 658 F.2d 139, 153-154 (3rd Cir. 1981), *cert. denied,* 455 U.S. 1019 (1982) (Exclusive dealing contracts between chewing gum company and baseball players did not constitute conspiracy to monopolize because defendant did not foreclose meaningful competition in the relevant market.).

Fourth Circuit: *American Football League v. National Football League,* 323 F.2d 124, 132 n.18 (4th Cir. 1963).

Fifth Circuit: *Associated Radio Service Co. v. Page Airways, Inc.,* 624 F.2d 1342, 1348 (5th Cir. 1980), *cert. denied,* 450 U.S. 1030 1981); and *Hornsby Oil Co., Inc. v. Champion Spark Plug Co.,* 714 F.2d 1384 (5th Cir. 1983). (District court's failure to instruct jury on relevant market in a dealer termination case brought as a conspiracy to monopolize constituted reversible error; proof of

enth Circuits hold that in a conspiracy to monopolize claim under §2, proof of a relevant market is not necessary.[20] All

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an adverse affect in a geographic and relevant product market are essential to recovery under the Rule of Reason.).

Eleventh Circuit: *Bill Beasley Farms, Inc. v. Hubbard Farms,* 695 F.2d 1341, 1343 (11th Cir. 1983) (A supplier's decision to cease selling to plaintiff and instead to sell its entire output to plaintiff's competitor could not have supported conspiracy to monopolize since there was no proof of a relevant market.).

District of Columbia Circuit: *Parkard Motor Car Co. v. Webster Motor Car Co.,* 243 F.2d 418, 420 (D.C. Cir.), *cert. denied,* 355 U.S. 822 (1957) (Termination of automobile dealer to appoint exclusive dealer sustained under the Rule of Reason where automobile manufacturer lacked market power.).

[20] Ninth Circuit: *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.,* 627 F.2d 919 (9th Cir. 1980), *cert. denied,* 450 U.S. 921 (1981).

Tenth Circuit: *Salco Corp. v. General Motors Corp.,* 517 F.2d 567 (10th Cir. 1975) (No relevant market required for branded product.).

Seventh Circuit: *United States v. National City Lines, Inc.,* 186 F.2d 562 (7th Cir.), *cert. denied,* 341 U.S. 916 (1951). District Courts in the Seventh Circuit have bridled at and criticized *National City Lines. See, Tire Sales Corp. v. Cities Service Oil Co.,* 410 F. Supp. 1222 (N.D. Ill. 1976) (criticizing *National City Lines*) and *Besser Publishing Co. v. Pioneer Press, Inc.,* 571 F. Supp. 640 (N.D. Ill. 1983) (Competitor's challenge to an acquisition as a conspiracy to monopolize would not require proof of a relevant market, but since the conspiracy to monopolize allegation was a small part of plaintiff's complaint and "was not intended, in the Court's view, to stand alone", it could not be used to defeat defendant's motion to dismiss for failure to define a relevant market.). The Seventh Circuit may have overruled *National City Lines* in *Ball Memorial Hospital v. Mutual Hospital Insurance,* 784 F.2d 1325, 1334-1335 (7th Cir. 1986) (Easterbrook, J.) (Under §§1 and 2 of the Sherman Act, Rule of Reason analysis must begin with an assessment of market power in a properly defined relevant market; unless the defendants possess market power, it is unnecessary to ask whether their conduct may be beneficial to consumers; firms without market power bear no burden of justification.).

Sixth Circuit: *Richter Concrete Corp. v. Hilltop Concrete Corp.,* 691 F.2d 818 (6th Cir. 1982).

Second Circuit: *United States v. Consolidated Laundries Corp.,* 291 F.2d 563 (2nd Cir. 1961) (Relevant market "not in issue" in

that is required is a specific intent to monopolize and an agreement for conduct that under §1 would be judged under the Rule of Reason.

In this case, the Eighth Circuit affirmed the district court finding that NFO had failed to prove a relevant geographic market, and accordingly affirmed dismissal of NFO's actual and attempted monopolization claims. (NFO II, 259a). The Eighth Circuit stated that NFO's proof of relevant geographic market was "problematical" and that NFO did not have a "consistent theory of geography". Therefore, "it [could not] say it was clearly erroneous for the district court to dismiss" the actual and attempted monopolization claims. (*Ibid.*).

The Eighth Circuit then went on to hold that proof of a relevant market in a §2 conspiracy to monopolize case is not necessary, because "attainment or 'dangerous probability' of monopoly power are not at issue". (NFO II, 260a.) According to the Eighth Circuit, a plaintiff proceeding under a §2 conspiracy claim need only establish the "geographic context" of the conspiracy (NFO II, 238a, 260a). This proof "need not be as rigorous as the relevant market showing for other §2 claims." (*Id.* at 238a). Thus, certain that defendants were major marketers of milk produced in a ten state region in the "Midwest" (NFO II, 258a) and that the "predatory"

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conspiracy to monopolize cases); and *Belfiore v. New York Times Co.*, 826 F.2d 177 (2nd Cir. 1987) (Newspaper's decision to integrate forward into distribution potentially actionable as a conspiracy to monopolize if it had the requisite specific intent, but claim here failed for lack of an agreement.). It is not clear that courts in the Second Circuit have followed *Consolidated Laundries. See, Karlinsky v. New York Racing Association, Inc.*, 517 F.2d 1010, 1012 (2d Cir. 1975); *Consolidated Terminal Systems, Inc. v. ITT Communications, Inc.*, 535 F. Supp. 225, 229 (S.D.N.Y. 1983) (The "absence of an allegation as to an individual's share of the purported market precludes a claim of conspiracy to monopolize.").

conduct occurred within the ten state region where NFO was a competitor, the court below concluded that NFO had met the minimal showing of "geographic context" of the conspiracy. The Court of Appeals never found that the "conspirators" conduct had an anticompetitive effect in any properly defined relevant market. Instead, it relied upon its own *de novo* findings of conspiracy and specific intent alone to support the §2 conspiracy claim.

In holding that a §2 conspiracy to monopolize did not require proof of a relevant market, the Eighth Circuit relied upon *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961). (NFO II, 238a). *Consolidated Laundries* misread this Court's decisions in *United States v. Yellow Cab Co.*, 332 U.S. 218, 225-226 (1947) and *United States v. du Pont de Nemours*, 351 U.S. 377, 395 n.23 (1956). In the former case, this Court was concerned with the *amount* of interstate commerce that was necessary to establish Sherman Act subject matter jurisdiction in a §2 conspiracy to monopolize case, not the standards under which a restraint is to be analyzed under §2. In *Dupont*, where this Court did say that a relevant market definition was not an issue, this Court was only commenting upon an earlier decision which was not even concerned with the relevant market.[21]

Resort to early Sherman Act jurisdictional decisions is not necessary to resolve the issue. This Court has only to look to

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[21] The Court in *Dupont* was merely describing the procedural history of this Court's opinion in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). It stated correctly that at that stage in the review, discussed in the *Story* opinion, "the scope of the market was not in issue." Indeed, a review of the history of *Story* clearly indicates a relevant market had been defined but was not contested on appeal. *Paterson Parchment Paper Co. v. Story Parchment Co.*, 37 F.2d 537, 538 (1st Cir. 1930), *rev'd.*, 282 U.S. 555 (1931).

the clear language of §2 of the Sherman Act to confirm that *all* §2 violations have the identical market definition requirements:

> Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty. . . .

The terms "monopolize" and "any part of the trade or commerce" have been consistently interpreted by this Court to require definition of a relevant market in monopoly and attempted monopolization cases. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965). Yet, those circuits holding that proof of a relevant market is not required in a conspiracy to monopolize case have held the same language to mean something else for conspiracy to monopolize than for monopolization or attempts to monopolize under the same statute. "The 'any part' language of §2 is applicable to all three of the enumerated offenses. If the 'any part of the trade or commerce' language is held to obviate the need for market definition in §2 conspiracy cases, a similar conclusion would appear to be compelled for actual and attempted monopolization cases . . . ." *The Relevant Market Concept and Conspiracy to Monopolize Cases Under Section 2 of the Sherman Act*, 44 U. Chi. L. Rev. 805, 809 (1977). Thus, there is no statutory support or support from the decisions of this Court to remove the relevant market definition requirement from any part of §2 of the Sherman Act.

B. In Holding That Business Conduct May Be Condemned As "Unreasonable" Under The Sherman Act In The Absence Of A Defined Relevant Geographic Market, The Court of Appeals Has Unsettled And Confused The Settled Course Of Decisions In Rule Of Reason Antitrust Cases.

The circuits which have dispensed with proof of an anticompetitive effect or market power in a properly defined relevant market in §2 conspiracy cases ignore the teachings of this Court and undermine the uniform application of the antitrust laws in Rule of Reason conspiracy cases under §1.

According to the Eighth Circuit, "the essential elements of a §2 conspiracy claim are concerted action and specific intent to monopolize, such that it need only be further shown that the conspiracy affect 'some appreciable part of interstate commerce.'" (NFO II, 238a). This sparce inquiry conflicts directly with this Court's development of the Rule of Reason in its decisions involving conspiracies to restrain trade under §1 of the Sherman Act and unfair and deceptive acts or practices under Section 5 of the Federal Trade Commission Act.

Under the "Rule of Reason", there must either be "genuine adverse effects on competition . . . 'such as a reduction in output'" or else there must be proof of "market definition and market power . . . to determine whether an arrangement has the potential for genuine adverse effects on competition." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460 (1986). This Court has consistently held that it is only in the context of a relevant market that an effect on competition can be measured. *See* e.g. *AGC*, *supra*, 459 U.S. at 540 n.44; *United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948). Market power and relevant market definition are central to

the substantive standards for the Rule of Reason inquiry. Market considerations provide "an objective benchmark" for determining substantive violations of the antitrust laws. *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977). This Court has thus required proof of market power in a relevant market either as an element of the substantive antitrust violation, *Continental TV, supra, Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984), *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 297-298 (1985), or as a factor in assessing the probable competitive effect of conduct under the Rule of Reason. *Broadcast Music, Inc. v. Columbia Broadcast Sys.*, 441 U.S. 1, 19-20 (1979); *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85, 104-107 (1984).

Indeed, without proof or consideration of an anticompetitive effect in a relevant market under the Rule of Reason, a non-*per se* conspiracy under §2 would be indistinguishable from a suit for an ordinary business tort. "Proof that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of a rule of reason case. It is the impact upon competitive conditions in a definable product market which distinguishes the antitrust violation from the ordinary business tort." *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979). The distinction goes to the very heart of the antitrust laws. Under Rule of Reason analysis, this Court has required inquiry into the effect of the restraint on competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

If the rule in the Eighth and the other divided circuits are followed, any plaintiff could strip the requirement of proof of market power or anticompetitive effect from a §1 claim, *FTC v. Indiana Federation of Dentists, supra*, and file the action

as a §2 conspiracy to monopolize by simply alleging a specific intent to monopolize. Thus, there would be no consideration of competitive effect in a properly defined relevant market or even any requirement to prove a relevant market in which to assess the actual alleged anticompetitive effect of defendant's conduct. The anticompetitive effect requirement in §1 Rule of Reason conspiracy would not exist for a conspiracy pleaded under §2.

This is precisely what has happened here, and what has happened in other circuits which do not require application of Rule of Reason standards to §2 conspiracies. The circuits which have dispensed with proof of market power in a relevant market and require only an allegation of specific intent to monopolize in §2 conspiracy cases have been forced to deal with challenges by plaintiffs to mergers without consideration of market share data,[22] restraints involving single brand products,[23] forward integration by manufacturers into distribution,[24] predatory pricing with specific intent to monopolize where there are clearly no barriers to entry,[25] and, most recently in the Eighth Circuit, "joint attempts to monopolize" where there has been no showing of market power.[26] Although in some of these cases the defendant was spared because the court could not find a specific intent to monopolize or in other cases the required agreement, it is clear that these cases would have otherwise been subject to dismissal under the

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[22] *Besser Publishing Co. v. Pioneer Press, Inc.*, 571 F. Supp. 640 (N.D. Ill. 1983).

[23] *Rea v. Ford Motor Co.*, 355 F. Supp. 842 (W.D. Pa. 1973); *Coleman Motor Co. v. Chrysler Corp.*, 376 F. Supp. 546 (W.D. Pa. 1974).

[24] *Belfiore v. New York Times Co.*, 826 F.2d 177, 183 (2d Cir. 1987).

[25] *International Distribution Centers, Inc. v. Walsh Trucking*, 812 F.2d 786, 795-796 (2d Cir. 1987).

[26] *Baxley-De Lamar Monuments v. American Cemetary Association*, 843 F.2d 1154, 1157 (8th Cir. 1988).

Rule of Reason standards of §1 for failure to show anti-competitive effect in a defined market.

This case clearly illustrates the anamolous impact on Rule of Reason standards that results from dispensing with proof of a relevant market in a §2 conspiracy case. After incorrectly holding that a conspiracy to monopolize only requires agreement and specific intent to monopolize without reference to a relevant market, the Eighth Circuit observed correctly that a violation of §2 "necessarily violates Section 1 as an 'unreasonable' restraint of trade." (NFO II, 260a). However, NFO's §1 claim, also dismissed by the district court, never could meet the requirements of §1 under the Rule of Reason because NFO neither proved power in a relevant market or anticompetitive effect in its §2 conspiracy case. The Eighth Circuit's ruling that its truncated §2 standard is equivalent to §1 is hard to square with its own holding in other §1 cases which require proof of power in a properly defined relevant market. *TV Signal Co. of Aberdeen v. American Telephone and Telegraph,* 617 F.2d 1302, 1309 n.8 (8th Cir. 1980). As the Eighth Circuit recently stated in a §1 Rule of Reason case, "[p]roof that defendant's activities had an impact upon competition in the relevant market is 'an absolutely essential element of the Rule of Reason case' ", *Ryko Mfg. Co. v. Eden Services,* 823 F.2d 1215, 1231 (8th Cir. 1987), because firms lacking market power cannot adopt restraints that have anticompetitive effects. *Ibid. See also Ball Memorial Hospital v. Mutual Hospital Insurance,* 784 F.2d 1325, 1334-1335 (7th Cir. 1986) (Easterbrook, J.) ("Market Power is a necessary ingredient in every case under the Rule of Reason . . . Unless the defendants possess market power, it is unnecessary to ask whether their conduct may be beneficial to consumers. Firms without market power bear no burden of justification.");

Superior Court Trial Lawyers Association v. Federal Trade Commission, 856 F.2d 226, 234 (D.C. Cir. 1988). Indeed, "in those instances where power [in a defined market] is a prerequisite to holding an agreement to be an unreasonable restraint of trade . . . it would make no sense to hold the same agreement to be offensive to §2 without power. To require power under §1 before condemning a particular agreement is necessarily to say that the arrangement is . . . not harmful in the absence of power. That policy conclusion cannot sensibly be avoided or negated by the simple trick of calling the agreement a conspiracy to monopolize." 3 Areeda & Turner, *Antitrust Law*, ¶839, p. 359 (1978).

Review of this case is warranted to instruct the lower courts that absent proof that a defendant's conduct has resulted in " 'actual detrimental effects, such as a reduction of output' ", *FTC v. Indiana Federation of Dentists*, 476 U.S. at 460, an antitrust plaintiff's threshold burden under §2 of the Sherman Act is to prove that the defendant has, or is in danger of achieving, market shares sufficient to enable him to exercise power to enhance price or reduce output in a properly defined relevant market in which competition is allegedly restrained. 7 P. Areeda & Hovenkamp, *Antitrust Law*, ¶1511, p. 429 (1986).

CONCLUSION

The decisions of the court below raise questions of importance relating to the remedial purposes of the antitrust laws that require answer for the instruction of the Federal judiciory and the antitrust bar. The petition for certiorari should be granted.

Respectfully submitted

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

Nos._____

IN THE

Supreme Court of the United States

October Term 1988

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,

vs.

NATIONAL FARMERS ORGANIZATION,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX A

STATUTES INVOLVED, PARTIAL TEXT

1. Section 1 of the Sherman Act, 15 U.S.C. §1, as amended, which provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

2. Section 2 of the Sherman Act, 15 U.S.C. §2, which provides in pertinent part:

> Every person who shall monopolize or attempt to monopolize, or combine or conspire with another person . . . to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony. . . .

3. Section 1 of the Capper-Volstead Act, 7 U.S.C. §291 which provides, in pertinent part:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of person so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . .

4. Section 4 of the Clayton Antitrust Act, 15 U.S.C. §15, provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

5. Section 6 of the Clayton Antitrust Act, 15 U.S.C. §17, provides in pertinent part:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

NFO IV

(850 F.2d 1286)

APPENDIX B

NATIONAL FARMERS' ORGANIZATION, INC.

Appellant,

NATIONAL FARMERS' ORGANIZATION DAIRY FARMER CLASS,

v.

ASSOCIATED MILK PRODUCERS, INC., MID-AMERICA DAIRYMEN AND CENTRAL MILK PRODUCERS COOPERATIVE,

Appellees.

NATIONAL FARMERS' ORGANIZATION, INC.,

Appellant,

NATIONAL FARMERS' ORGANIZATION DAIRY FARMER CLASS,

v.

ASSOCIATED MILK PRODUCERS, INC., MID-AMERICA DAIRYMEN AND CENTRAL MILK PRODUCERS COOPERATIVE,

Appellees.

Nos. 87-1046, 87-1047.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 12, 1987.
Decided July 6, 1988.

Before HEANEY and McMILLAN, Circuit Judges, and BEAM*, District Judge.

HEANEY, Circuit Judge.

This private antitrust action is before the Court for the second time. When the matter was first here, we held that the appellees had engaged in a broad conspiracy in violation of the antitrust laws and that their unlawful acts had injured National Farmers' Organization, Inc. (NFO). We remanded the matter to the district court with directions to determine the amount of NFO's damage.

On remand, NFO advanced two alternative damage measurement theories. Under a "market structure theory", NFO claimed damages of $18,490,694, trebled to $55,472,082. Under a "test market theory", it claimed damages of $7,403,374, trebled to $22,210,122. The district court refused to award any damages, and NFO again appeals.

We reaffirm our holding that NFO incurred substantial damages as a result of appellees' unlawful acts. We provide more specific directions to the district court with respect to the computation of damages and remand to it for that computation. We also direct the district court to determine and award appropriate attorney's fees and costs. We affirm the district court's denial of certain injunctive relief and its denial of class certification.

I. Background

This action returns to the Court more than five years after we remanded it to the district court and more than seventeen years after it was commenced. The district court conducted the original trial in three phases. Phase I involved claims brought by Mid-America Dairymen, Inc.

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*The Honorable C. ARLEN BEAM, United States District Judge for the District of Nebraska, sitting by designation.

(Mid-Am) against NFO for violation of state and federal antitrust laws. Phase II involved NFO's counterclaims against Mid-Am, Associated Milk Producers, Inc. (AMPI), Central Milk Producers Cooperative (CMPC) and Associated Reserve Standby Pool Cooperative (ARSPC) for violations of the federal antitrust laws. Phase III involved AMPI's claims against NFO and nineteen individual NFO members for violation of the federal antitrust laws and certain provisions of the Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2303(c). (e) and (f). In an exhaustive 147-page opinion, the district court found in favor of NFO on the phase I and III claims and against NFO on the phase II claims. *In Re Midwest Milk Monopolization Litigation,* 510 F.Supp. 381 (W.D.Mo.1981) (NFO I).

On appeal, this Court affirmed the district court with respect to the phase I and III claims. *Alexander v. National Farmer's Organization,* 687 F.2d 1173, 1183-1190 (8th Cir.1982) (NFO II). With respect to the phase II claims, we affirmed the district court's findings that NFO failed to present sufficient statistical evidence to support its claims of actual and attempted monopolization, *id.* at 1191-92, and that NFO had not produced sufficient evidence to support a finding of liability on the part of ARSPC arising out of its operation of standby milk pools, *id.* at 1207. We reversed the district court's rejection of the remainder of NFO's claims, however, finding that "AMPI, Mid-Am and CMPC did conspire to monopolize and eliminate competition in the marketing of Grade A raw milk produced in the Midwest, through the use of discriminatory pricing, coercive supply disruptions and threats of similar conduct, as well as bad faith harassment and threats of litigation against independent buyers of NFO milk." *Id.* at 1193.

We found that the conspiracy proved by NFO covered a ten-state midwestern region and had as one of its goals elimination of NFO as a competitor in the marketing of raw

Grade A milk.[1] *Id.* at 1193. With respect to the conspiracy element, we found that AMPI and Mid-Am each belonged to the other's organization and effectively divided marketing territories in the Midwest, South and Southwest; that AMPI was a member of CMPC and served as CMPC's marketing agent in Chicago, which area served as a base pricing point for other areas served by Mid-Am; that Mid-Am and AMPI officials met from time to time to discuss their concerns regarding NFO; and that, at one point, senior officials of CMPC, Mid-Am and AMPI held a joint meeting to discuss problems created by NFO's lower prices and successful solicitation of their members. *Id.* at 1194-95.

In examining specific overt acts of AMPI, Mid-Am and CMPC in furtherance of the conspiracy, we set forth examples of conduct which, viewed in the context of the entire record, "demonstrate[d] concerted, unlawful tactics." *Id.* at 1207. The examples included the following.

A. *The Gandy Dairy Matter (Supply Cut-offs and Limitations)*

Prior to May of 1971, Gandy Dairy, of Central West Texas, purchased all of its milk from AMPI. In March and April of 1971, however, Gandy agreed to buy some milk from independent suppliers. On the day the shipments from the independents began, AMPI began "short shipping" and making late deliveries of milk to Gandy. At the same time, AMPI began soliciting Gandy's customers and offering

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[1]Our opinion stated:

> NFO made a more than adequate showing of the ten-state region within which the defendants engaged in efforts to gain control over and eliminate NFO as a competitor in the marketing of raw Grade A milk. NFO has also demonstrated that the conspiracy affects a substantial amount of interstate commerce—millions of pounds of Grade A milk shipments alone.

NFO II, 687 F.2d at 1193.

them direct shipments of competing products at prices near Gandy's cost of production. The avowed purpose of this conduct was to force Gandy to return to AMPI for its full requirements of milk. This Court found AMPI's conduct "blatantly predatory." *Id.* at 1196.

B. *The Wanzer Dairy Matter (Discriminatory Pricing)*

Since the Chicago area served as a base pricing point for other areas to the south and west, appellees sought to maintain an elevated price in it. In 1970, however, CMPC's price was being undermined by Wanzer Dairy's purchases of non-CMPC milk at lower prices. In response to the purchases, AMDI, a major trade association of proprietary milk buyers in Chicago, met with CMPC and demanded that it drop its price so long as Wanzer was able to obtain milk at a lower price. CMPC complied with the request. At the same time, however, CMPC announced a new price structure, imposing additional charges on any buyer taking less than all of its requirements from CMPC. Later in 1970, after several independent marketers who had previously supplied Wanzer joined CMPC, CMPC again raised prices to buyers taking less than all of their requirements from it. The price increase was especially harmful to Wanzer because it could not fulfill its milk requirements without purchasing some milk from CMPC.

Notwithstanding the price pressure, Wanzer continued to purchase milk from independents, aided to some degree by NFO's offer to reimburse Wanzer for some of the additional charges. In response, AMDI dealers met with CMPC and renewed their objections to paying the CMPC price while Wanzer was obtaining cheaper supplies of milk. After this meeting, CMPC sent a letter to Wanzer threatening to discontinue all milk shipments in five days because "we have become aware that you have been engaged with others in unlawful attempts to interfere with producers whose milk is subject to effective marketing agreements with CMPC and its members." A short time after the letter,

Wanzer entered into a one-year committed supply contract with CMPC. CMPC then met with the AMDI dealers, informed them of the Wanzer contract, and reinstated its elevated price. *See id.*, at 1198.

We concluded that:

> [T]he conduct so established is predatory on its face. Our examination of the underlying evidence only confirms that an inference of unlawful purpose must be drawn. It was clear error for the district court not to find that the pricing scheme was unlawfully discriminatory and that the threatened supply cutoff was unlawfully coercive.

Id. at 1199.

C. *Beatrice Dairy (Sham Litigation or Threats of Sham Litigation)*

In July of 1970, Beatrice Dairy of Fort Worth, Texas, began buying milk from NFO. By February of 1971, it was buying several million pounds of NFO milk per month. By early 1971, Mid-Am had advised Beatrice that it thought NFO's marketing was illegal and that it had the exclusive right to market some of the milk NFO was selling to Beatrice. Mid-Am later met with Beatrice and threatened legal action unless it was paid for the disputed milk. In March of 1971, Mid-Am sued Beatrice and NFO. Thereafter, Beatrice notified NFO that, due to the dispute and NFO's refusal to indemnify it for losses as a result of Mid-Am's action, it was immediately terminating purchases from NFO.

In summarizing the evidence with respect to the Beatrice sham litigation claim and rejecting the appellees' theory that NFO's injuries were self-inflicted, we stated:

> Both Mid-Am and AMPI contend that Beatrice's cut-off of NFO was a unilateral, uncoerced business judgment based upon price and quality considerations . . . . The termination letter itself and contemporaneous deposition testimony of the Beatrice officials involved in the

> decision leave no doubt that the acute factor behind the cutoff was Mid-Am's legal claim . . . . Whatever price or other problems may have accompanied NFO milk, the undisputed facts are that Beatrice purchased an ever-increasing volume of such milk continuing right up to the sudden cutoff, which came twelve days after Mid-Am filed suit against Beatrice. In view of the timing and other contemporaneous evidence and the fact that the cutoff was made in consultation with Beatrice's legal department, there is simply no doubt that the Mid-Am litigation was a material cause of the cutoff.

Id. at 1202 n. 34.

D. *Other Acts*

Our prior opinion listed examples of other incidents and actions which could, in the totality of the circumstances, only be viewed as unlawfully aimed at eliminating NFO as a competitor. Among these actions were: Mid-Am's refusal to deal with NFO members who wished to terminate their relationship with Mid-Am regardless of the members' right to terminate, and Mid-Am's firing of a contract hauler for engaging in activities helpful to NFO. *Id.* at 1204-05.

Viewing the record as a whole, we found that the appellees engaged in a broad conspiracy to monopolize the marketing of Grade A milk in a ten-state region by engaging in:

> [a] series of unlawful acts . . . aimed at eliminating independent sales of milk in general and NFO in particular, including discriminatory pricing and actual or threatened supply cutoffs, litigation and similar harassment. *Id.* at 1207-08.

In addition, we found that the appellees' unlawful conspiracy was a material cause of substantial injury to NFO. *Id.* at 1210. Accordingly, we remanded to the district court with directions to it to determine the amount of damages to which NFO was entitled and set forth guidelines to be used in that determination. *Id.* at 1208. The guidelines included the following:

(1) Because NFO is a nonprofit entity which distributes sales proceeds to members after deducting marketing expenses and its net revenues were tied to sales volume and not to price, NFO could not recover the difference between the price it would have obtained but for the conspiracy and the price it actually obtained. Such a price differential, we held, belonged to its members—not to NFO.

(2) Because the appellees' unlawful conduct caused NFO to lose both members and marketing volume, NFO could recover for losses of membership dues and checkoff fees.

(3) Because NFO had clearly established the fact of injury,[2] the district court had broad latitude in assessing the amount of damages. *Id.* at 1210.

On remand, the district court afforded NFO the opportunity to present additional evidence in support of its damage claim. NFO expressly declined to do so, choosing instead to rely upon the damage theories and supporting evidence it presented at the original trial. *Alexander v. National Farmers' Organization,* 614 F.Supp. 745, 758, 775 (W.D.Mo.1985) (NFO III). After extensive briefing and argument, the district court rejected NFO's damage claims in their entirety. *Id.* at 792-93, 795, 799. In our view, it erred in so doing. Thus, although this matter has already consumed months of the district court's time, we have no alternative but to remand for an award of damages consistent with the detailed instructions set forth herein.

II. NFO's Damage Theory

[1] NFO introduced two alternative damage theories at trial, primarily through the testimony of its damage expert,

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[2]This opinion shall use the term "fact of injury" to denote the presence of a violation that was a material cause of at least some injury.

Robert R. Nathan. The theories were both used to estimate NFO's lost dues and checkoff fees. The theories were described as the "test market" and "market structure" approaches. The district court rejected both theories, finding that "Nathan's testimony and NFO's damage exhibits adduced in connection therewith cannot be accepted as credible under all the circumstances of this case." *NFO III,* at 792. Accordingly, the court concluded that "a just and reasonable estimate of NFO's alleged lost market penetration damages cannot be made on any credible relevant data adduced by NFO." *Id.* at 793. We affirm the district court's rejection of the market structure theory.[3] With respect to

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[3]The market structure theory, under which NFO claimed some $18,490,694 in actual damages, trebled to $55,472,082, is not derived from NFO's actual performance on any order or in any market but assumes that NFO would have attained the share of an average sized major participant on each damage order in terms of milk pooled.

Computing its damages under the market structure approach, NFO defined a major firm on the damage orders as one accounting for five percent or more of the milk pooled on an order. It then requested the USDA to determine the number of pooling firms on each order meeting its definition of major and the combined market share of those firms. *See* NFO Trial Exhibit No. 1014. Using this information, NFO determined its assumed market share by dividing the combined market share of the major pooling firms by the number of such firms on each order (including NFO). From this computation, NFO derived the following projected market share on each damage order: Order 30, 11.57%; Order 60, 11.26%; Order 61, 16.49%; Order 62, 46.33%; Order 64, 31.99%; Order 65, 31.86%; Order 68, 14.89%; Order 73, 48.11%; Order 106, 33.20%; Order 126, 21.14%.

The district court held that the record simply does not support the market structure theory. Our review of the record indicates that the strongest evidence tending to support the theory is testimony that the tendency in all industries, and particularly in milk marketing, is to have a small number of large firms

the test market theory, however, we hold that it is a proper basis for a substantial damage award.

[2] Preliminarily, we note that the district court appears to have used an inappropriate legal standard in rejecting Nathan's testimony and NFO's damage exhibits. In order to recover damages, NFO had to show: (1) that the appellees violated the antitrust laws; (2) that the violation caused it injury; (3) that the injury was of a type sought to be

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competing amongst themselves and a large number of small firms competing amongst themselves. From this basic premise, NFO's damage expert reasoned,

> [i]f you have a limited number of major firms and a new entrant possesses capability and experience to become a major firm, the competition will primarily focus between that new entrant with the capability of being a major firm and the other major firms rather than with a small firm. Therefore, I think it is appropriate to conclude that the new entrant with the capability of being a major firm will tend to compete with and participate in that segment of the market which is accounted for by the major firms.

Trial Transcript at 9641.

Such an assumption, however, even if accepted, does not provide a basis for concluding that NFO would have attained a share equivalent to that of a hypothetical average major firm on each order. Therefore, the record simply will not support NFO's proffered damage computations based on the market structure theory. Accordingly, we affirm the district court's rejection of the market structure theory.

In addition, we note that, with respect to the relative accuracy of the market structure and test market theories, NFO's damage expert testified that the test market approach would tend to understate the damages and that the market structure approach, given the larger figures, would be subject to greater error. Therefore, the expert testified that the average of the two probably represents the best estimate of NFO's damage. *See* Trial Transcript at 9733-35. Our rejection of the market structure theory as unsupported by the record, however, also necessitates rejection of the average, based in part on that theory.

prevented by the antitrust laws;[4] and (4) the amount of its injury. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-25, 89 S.Ct. 1562, 1576-77, 23 L.Ed.2d 129 (1969); *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1378 (8th Cir.1983), *cert. denied*, 469 U.S. 870, 105 S.Ct. 219, 83 L.Ed.2d 149 (1984); Von Kalinowski, 10 Antitrust Laws and Trade Regulation §§ 115.03, 115.04.

While the first three of these elements must be established by a preponderance of the evidence, a lesser standard of proof is applicable to proof of the *amount* of damage. *See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981) (distinguishing higher standard of proof for establishing *fact* of injury from lower standard of proof for establishing *amount* of damage); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931) (same).

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[4]With respect to standing, our prior opinion stated:

> As NFO's market penetration grew, it earned net revenues in the form of membership dues and checkoff fees from those who marketed milk through NFO. Losses of such dues and fees, to the extent attributable to the defendants' unlawful conduct, represent direct injury to NFO in its "business or property." It is axiomatic that a competitor directly injured from such a conspiracy is a real party in interest and has a sufficient personal stake in the outcome to have standing to assert an antitrust claim.

NFO II, 687 F.2d at 1209 (footnote omitted).

On remand, the appellees again raised a challenge to NFO's standing, arguing that *Associated General Contractors v. Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), and this Court's application of that case in *McDonald v. Johnson & Johnson*, 722 F.2d 1370 (8th Cir.1983), *cert. denied*, 469 U.S. 870, 105 S.Ct. 219, 83 L.Ed.2d 149 (1984), changed the law of antitrust standing so as to preclude recovery by NFO. The district court disagreed, finding that NFO had standing to assert the dues and checkoff claims. *NFO III*, 614 F.Supp. at 751. We affirm the district court in this regard.

[3] This lower standard derives from the principle that a wrongdoer should not profit from the harm occasioned by its act. *See, e.g., Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-66, 66 S.Ct. 574, 579-80, 90 L.Ed. 652 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."), *quoted in J. Truett Payne Co.*, 451 U.S. at 566, 101 S.Ct. at 1929; *see also Story Parchment Co.*. 282 U.S. at 563, 51 S.Ct. at 250 ("[I]t would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.") Therefore, in proving the *amount* of damage, the antitrust plaintiff need only present evidence from which the fact finder may make a just and reasonable estimate of the damage that is not based on speculation or guesswork. *J. Truett Payne Co.*, 451 U.S. at 566-68, 101 S.Ct. at 1929-30; *Zenith Radio Corp.*, 395 U.S. at 124, 89 S.Ct. at 1577; *Bigelow*, 327 U.S. at 264, 66 S.Ct. at 579; *Story Parchment Co.*, 282 U.S. at 563, 51 S.Ct. at 250.[5]

Applying the standard, the Supreme Court has recognized that "the vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation," *J. Truett Payne Co.*, 451 U.S. at 566, 101 S.Ct. at 1929, and has admonished the courts to "observe the practical limits of the burden of proof which may be demanded of a treble-

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[5]*See also Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 393 (8th Cir.1987); *MCI Communications v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1161 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983); *Rosebrough Monument Co. v. Memorial Park Cemetery Association*, 666 F.2d 1130, 1146 (8th Cir.1981), *cert. denied*, 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed.2d 1321 (1982); *Agrashell, Inc. v. Hammons Products Co.*, 479 F.2d 269, 283 (8th Cir.), *cert. denied*, 414 U.S. 1022, 94 S.Ct. 445, 38 L.Ed.2d 313 (1973).

damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market." *Zenith Radio Corp.*, 395 U.S. at 123, 89 S.Ct. at 1576. The Court has acknowledged that "[a]ny other rule . . . would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain." *Zenith Radio Corp.*, 395 U.S. at 124, 89 S.Ct. at 1577.

Appellees contend that this Court's prior opinion established only that they engaged in unlawful conduct, leaving issues of causation to be determined on remand. We disagree. The opinion is clear that NFO established the fact of injury, that is, antitrust violations by the appellees which were a material cause of some injury to its business or property. *See NFO II,* 687 F.2d at 1210 ("Because the fact of injury is unmistakable on this record, the district court has rather broad latitude in assessing the amount of damages which NFO shall recover.")

Specifically, we cited examples of the appellees' unlawful conduct which caused injury to NFO. Among these were: CMPC's conduct with respect to Wanzer dairy,[6] Mid-Am's unlawful threats of litigation against Beatrice dairy,[7] and

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[6]This Court stated:

> In our view, this record sufficiently establishes the fact of injury to NFO, such that the extent of harm and precise effect of the Wanzer contract go only to the question of the amount of damages.

NFO II, 687 F.2d at 1199 n. 29.

[7]This Court stated:

> In view of the timing and other contemporaneous evidence and the fact that the cutoff was made in consultation with Beatrice's legal department, there is simply no doubt that the Mid-Am litigation was a material cause of the cutoff.

NFO II, 687 F.2d at 1202.

Mid-Am's and AMPI's conduct with respect to Foremost Dairy.[8]

Since our prior opinion clearly established the fact of injury to NFO, the district court on remand should have separately and independently examined the damage evidence put forward at trial by NFO in light of the lesser standard of proof applicable to determining the amount of damages. Instead, the district court rejected the evidence in its entirety because certain portions of it rested upon proposed findings the court rejected in the liability phase of the case. Such a practice, in effect, ignores the lesser standard of proof applicable to the amount of damages.

Moreover, in light of our prior opinion and the damage evidence adduced by the parties, even if the district court's review had not been so tainted, its finding that NFO offered insufficient proof to recover any damages would be clearly erroneous. As we point out below, NFO's damage evidence, while not perfect, clearly establishes the basis for a significant award. It is to this basis that we now turn.

A. *The Test Market Theory*

Under the test market theory, NFO sought to use its performance in an identifiable portion of the relevant

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[8]This Court stated:

> Foremost's "objective" decision to reject [a shipment of NFO milk] was pervaded by Mid-Am's litigation tactics against buyers of NFO milk and AMPI's prior reprisals for independent purchases. The only real dispute in the record is over which of these factors was more dominant in Foremost's decision.
>
> Viewed in the larger context of the overall conduct engaged in by those co-ops, the Foremost incident gives rise to only one conclusion: NFO was caught in a whipsaw created by the coercive conduct of AMPI and Mid-Am towards buyers of independent milk in general, and of NFO milk in particular.

NFO II, 687 F.2d at 1204.

market as a "yardstick" to measure its performance in the remainder of the market.[9] NFO chose as its yardstick measure its performance in federal milk market order number 68, a market order encompassing Minneapolis and St. Paul, Minnesota, and the surrounding area.

After selecting the order, NFO obtained from the United States Department of Agriculture (USDA) the total volume of milk pooled on it in each month for the years 1971 to 1975 and the total volume of milk pooled by NFO on it during the same period.[10] From these figures NFO derived its monthly percentage market share on the order. This computation yielded a 10.5 percent share for 1973. NFO used this 10.5 percent share as a basis for estimating its lost checkoff fees and membership dues on the damage orders.

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[9]In discussing markets it is important to note that the relevant geographic market was found in our prior opinion to encompass a ten-state area in the midwestern United States. *NFO II,* 687 at 1193. This geographic damage market is distinct from the various regions in which, by federal regulation, milk is pooled and distributed. Such regions are commonly referred to as "market orders." For example, the region NFO seeks to use as a "test market" encompassed Minneapolis and St. Paul, Minnesota, and surrounding areas, and was denominated federal market order number 68. The market orders are relevant to this case because reliable statistics concerning milk marketing in the relevant geographic market are available only for each federal market order. Since milk producers in the geographic damage market primarily pooled milk on ten federal market orders, NFO properly concentrated its damage estimates on these ten orders. Throughout the remainder of this opinion, the ten orders will be referred to as the damage orders.

[10]The total milk volume figures were taken from the United States Department of Agriculture publication *Federal Milk Order Market Statistics Annual Summaries 1971-1975.* The volume of NFO milk pooled was compiled by the United States Department of Agriculture's Agricultural Marketing Service. See NFO Trial Exhibit No. 1225.

Appellees contend that the test market theory does not provide a sufficient basis to support NFO's damage claim. The validity of the theory turns primarily on whether the relevant conditions in the other damage orders sufficiently resemble the conditions in order number 68—the proposed test order (or "yardstick measure")—that extrapolation of NFO's performance to the other damage orders will provide a just and reasonable estimate of NFO's damage.

This Court has previously accepted the use of a yardstick measurement in determining the amount of antitrust damages. In *Agrashell, Inc. v. Hammons Products Co.*, 479 F.2d 269 (8th Cir.1973), this Court approved a yardstick measurement of the Plaintiff's (Hammons') damages for its alleged "failure to grow." The plaintiff's damage expert testified that he chose as the yardstick measure a portion of the relevant market where the defendant's antitrust violations were not prevalent.

This Court acknowledged that the expert's yardstick measurement had many defects, including that the test area had only one customer in it, that other customers almost always purchased smaller volumes, and that the test area customer may not have viewed the plaintiff's and defendant's products as interchangeable. In addition, the Court noted that the plaintiff's damage expert acknowledged he had not considered whether companies other than the defendant sold similar products or the impact of such sales. Finally, the Court noted the expert offered no support for the position that the test area was relatively unaffected by the defendant's unlawful conduct.[11] Despite these defects, the Court found, as a matter of law, that the expert's testimony sufficiently proved the amount of damage, citing

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[11]In addition, two of the four claims of unlawful conduct on which the expert based his damage theory were eventually rejected. *Agrashell, Inc.*, 479 F.2d at 283.

the principles set down by the Supreme Court in such cases as *Zenith Radio Corp.* and *Bigelow. Id.* at 283.

Similarly, NFO's yardstick measurement is not perfect. The record contains evidence that the order was unique in several respects, including its location in a surplus production area and the fact that a greater number of facilities existed in the area to handle that surplus. In addition, NFO enjoyed a relatively strong membership base on the order.[12] Finally, as the district court highlighted in its decision, there is evidence in the record that dairy production in Minnesota grew at a faster rate than in the rest of the nation. NFO responds that milk pooled on order 68 comes from places other than Minnesota and that the growth of Minnesota production does not destroy the comparability of the order.[13]

Probably the most troublesome criticism of the use of order 68 as a yardstick, however, is the implication that the

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[12]NFO trial exhibit number 1023 reveals that NFO estimated its 1969 membership on each damage order as follows: Order 30, 7.1%; Order 60, 11.0%; Order 61, 10.4%; Order 62, 6.8%; Order 64, 7.1%; Order 65, 7.4%; Order 68, 8.8%; Order 73, 6.1%; Order 106, 2.9%; Order 126, 3.0%.

[13]It is interesting that both NFO and the appellees adopt different views of the nature of federal orders depending upon the context. For example, in arguing that a federal order is an appropriate unit as a yardstick measure, NFO emphasizes the degree to which milk marketed on an order normally comes from producers located within that order. On the other hand, faced with the relatively rapid growth of dairy production in order 68, NFO emphasizes the large amount of milk pooled on the order that comes from outside its borders. The appellees, for their part, argue that order 68 is not a valid yardstick because its liberal pooling provisions allow milk from outside of the order to be pooled with regularity. They also argue, however, that the rapid growth of production within the geographical boundaries of the order makes it unsuitable as a yardstick measure.

liberal pooling provisions applicable on the order allowed NFO to pool large quantities of milk on it in order to artificially inflate its performance.[14] Yet, whatever the merit of this contention, the record does not disclose that the appellees ever presented any evidence from which the district court could have reduced the yardstick measurement. The only suggestion was that the court should entirely ignore NFO's performance in order 68. Such a course cannot be sustained.

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[14]The testimony of the appellees' damage expert, Dr. Babb, reveals the following:

> Q Would you look at NFO exhibit 1016, please?
>
> * * * * * *
>
> Q What does it purport to show, to your understanding?
>
> A It shows the actual volumes of milk pooled by NFO for the years 1970 through 1980.
>
> Q With respect to old Order 68, does it show a higher or lower or what proportionate share compared to other orders, and considering the size of old Order 68?
>
> A It shows that NFO marketed milk in Order 68 starting in 1971. And in 1971 and 1972 and 1973 it did not pool any of its producers in the Minnesota-North Dakota Order or in the Southeast Minnesota-Northern Iowa Order.
>
> Q Are those adjacent orders to Order 68?
>
> A They are.
>
> * * * * * *
>
> Q If one wanted to design a test market, would it be possible, under the Federal Order provision, to your knowledge, to pool an unusual amount of milk for producers on a particular Federal Order, particularly with reference to old Order 68?
>
> A The old Order 68 had somewhat more liberal pool provisions, pool plant provisions compared to other orders in the U.S. These pool plant provisions I believe were made effective in 1972. The pool plant provisions of the current upper Midwest Order, which became effective I believe in June of '76, are even somewhat more liberal.

Trial Transcript at 14,456-57.

For all of the shortcomings of the order as a yardstick measurement, the undeniable fact is that NFO actually managed to pool a 10.5 percent share on it over the entire year in 1973. In addition, review of this Court's prior opinion indicates that the order was not free from the appellees' unlawful acts and that NFO might have pooled an even larger share had it not been for these acts. Specifically, this Court cited Mid-Am's threat of litigation against Cloverleaf Creamery, a dairy located in order 68, as corroborating other evidence establishing a pattern of conduct involving threats of sham litigation. *See NFO II,* 687 F.2d at 1202 n. 33. Moreover, even if order 68 had been free of unlawful conduct by the appellees, it cannot be presumed that the appellees' unlawful conduct elsewhere would have had no "spillover" effect onto the order. Thus, to the extent that the appellees' unlawful acts restricted NFO's efforts in order 68, its use would tend to underestimate NFO's damages.

There are also factors indicating that order 68 was comparable to the other damage orders. Most significantly, as in *Zenith Radio Corp.*, the relevant product and seller were the same in the test market area as in the damage area. In addition, with the exception of pooling provisions, it appears that the federal regulations applicable to the federal orders are substantially similar.

Finally, we note that the appellees offered no reasonable substitute yardstick measurement. Instead, the record reflects that the appellees' strategy at trial was to present only evidence which tended to show NFO had not been injured at all. To this end, they presented testimony of Dr. Babb and George Hansen, comparing, for the years 1970-77, NFO's performance on the damage orders with its performance on 19 non-damage orders. According to the testimony, because NFO performed as well or better on the damage orders as on the non-damage orders, it was not injured at all by the appellees' unlawful acts.

The study, however, is fatally defective in a number of respects. Most importantly, it is clear that NFO's dairy marketing efforts were focused in the Midwest, the area where its membership base was the strongest.[15] Thus, one

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[15]Review of the testimony of various NFO officials indicates that the focus of NFO's dairy program was the ten-state midwestern damage area.

For example, Al Scott, an assistant director of NFO's dairy program, testified:

> Q During the early years of the NFO dairy program, was the program more active or more focused in any particular geographic area?
>
> * * * * * *
>
> A Our focal point at that time was throughout the Midwest. It was the midwestern states.
>
> Q What do you mean when you say "Midwest"?
>
> A Well, Wisconsin, Minnesota, Iowa, Missouri, Illinois, Kansas, Nebraska. This would be the primary area.

Trial Transcript at 2548.

In addition, Oren Staley, director of NFO, testified:

> Q Did there come a time, Mr. Staley, when NFO started to establish plans for the direct marketing of Grade A milk?
>
> A Yes.
>
> Q And when was that?
>
> A In 1969, late 1969.
>
> * * * * * *
>
> Q In your planning, where did you plan to go into the direct marketing of Grade A milk?
>
> A We ha[d] the most interest in the early discussions in Southwest Missouri and Wisconsin. So that is where we decided to start.
>
> Q Did you have any plans to go beyond that?
>
> A Yes. But we were going to get our experience in those and then move rapidly over the rest of the area.
>
> Q You said "the rest of the area" in your answer. What do you mean by that?

would expect NFO to make its strongest showing in that area. The fact that it did so despite the appellees' unlawful practices does not mean that NFO suffered no damage. Indeed, NFO's relative success in the face of the numerous unlawful acts of the appellees is an indication of NFO's capability in a violation-free market.[16] In addition, the

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A Well, at that point, the area would have been the heart of the Midwest where our organization was the strongest. That is the place where we would go.

Q What states does that include?

A This would have included at that time Wisconsin, Minnesota, Iowa, Missouri, Illinois and Kansas and Nebraska. It may have been some in Arkansas. Basically it was those states.

Q How soon did you plan to get into marketing in those states?

A Well, the first thing was to find the markets, and as soon as we found the markets, the availability, that we could report back to the members that here was a market that was available, and then we worked with the counties at that point of saying this is it, this is how much milk we need, and you put it together with your neighbors, and then establish the routes and the reloads. All those are to be a combination, but starting off with the interests of the members and the markets.

Q How long after you had the experience in Southwest Missouri and Wisconsin did you expect to go into those other areas?

* * * * * *

A Well, everything that we have done, we always hope it to be just a matter of weeks. We certainly would expect to have been done within a matter of months, six or eight months, covering the Midwest.

Trial Transcript at 1697-1700.

[16] *Cf. Agrashell, Inc.*, 479 F.2d at 280, in which this Court reviewed a damage award based, not on the premise that the plaintiff lost business but, upon the premise that the defendant's unlawful acts deprived the plaintiff of business it should have had. We upheld the award, despite the fact that the both the plaintiff's and the defendant's businesses prospered during the damage period.

appellees made no showing of comparability of the non-damage markets. Finally, the conclusion to be drawn from the appellees' damage theory—that NFO suffered no damages at all from the unlawful conduct—is fundamentally at odds with this Court's prior opinion which established that NFO had suffered at least *some* damage as a result of the unlawful conspiracy.

[4] In sum, we recognize that NFO's test market theory is not perfect. Nonetheless, in light of the Supreme Court's repeated admonition that it does not " 'come with very good grace' for the wrongdoer to insist upon specific proof of the injury which it has itself inflicted," *J. Truett Payne Co.*, 451 U.S. at 566-67, 101 S.Ct. 1929 at 1929 (quoting *Hetzel v. Baltimore & Ohio R. Co.*, 169 U.S. 26, 18 S.Ct. 255, 42 L.Ed. 648 (1898)), we hold that the Federal Market Order 68 is sufficiently comparable to the other damage orders that extrapolation of NFO's performance on that order to the other damage orders will provide a just and reasonable estimate of NFO's damage.

Using the 10.5 percent share it achieved on order 68 as a yardstick against which to measure its performance on the remaining damage markets, NFO presented evidence relating to elements of its damage claim expressly approved of in our prior opinion—lost checkoff proceeds and lost membership dues.

B. *Checkoff Proceeds*

[5] NFO paid its member producers the proceeds from sales of their production, less a marketing fee (ordinarily measured in cents per hundredweight of milk handled). This marketing fee is referred to as a "checkoff."[17] *See NFO*

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[17]Our prior opinion recognized that:

> Those who directly suffered price reduction damages are individual farmers, but NFO cannot recover the measure of their injury—it can only recover for its direct injury.
>
> *Alexander v. National Farmers Organization, NFO II*, 687 F.2d at 1209.

II, 687 F.2d at 1208. NFO's lost checkoff fee calculation involved estimating the additional volume of milk it would have marketed absent the restrictive practices, multiplying that volume by the checkoff fee it would have obtained, and deducting the extra expense it would have incurred in handling the extra volume.

In order to estimate the additional volume of milk it would have marketed absent the restrictive practices, NFO first obtained from the USDA a summary of the total milk pooled on each market order. Next, it multiplied the total volume of milk pooled on each order by the 10.5 percent yardstick measure to obtain the volume of milk it would have pooled absent the restrictive practices. Finally, NFO subtracted from that volume the volume of milk it actually pooled on each order to arrive at the total additional volume it would have marketed.[18]

Once NFO had computed this additional volume of milk, it could determine the amount of its damages by multiplying the volume by the three cents per hundredweight checkoff it received on all milk marketed during the damage period.[19]

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[18]For example, on order number 30 (encompassing Chicago, Illinois, and surrounding areas) for the year 1974, 81,492,152 hundredweight of milk was marketed. NFO estimates that absent unlawful restraints, it would have marketed 10.5% of that total, or 8,556,676 hundredweight. *See* NFO Trial Exhibit No. 1015. In order to determine the volume lost, NFO next subtracted from the volume it estimated it would have pooled, the volume of milk it actually pooled, or 3,213,850 hundredweight. *See* NFO Trial Exhibit No. 1016. Thus, NFO estimated its lost volume at 5,342,826 hundredweight (8,556,676—3,213,850). *See* NFO Trial Exhibit No. 1017.

[19]The record contains ample evidence as to the fact that the customary checkoff fee was three cents per hundredweight during the entire damage period. *See* Trial Transcript at 6447 (testimony of Donald Berkhahn); Trial Transcript at 7980 (testimony of Gene Potter); Trial Transcript at 8651 (testimony of Dennis Hurley).

The appellees object to NFO's checkoff computation on the ground that the three cent per hundredweight figure represents NFO's gross losses and does not include expenses associated with marketing the additional volume of milk. NFO trial exhibit numbers 1003 and 1004, however, summarize the additional expenses associated with NFO's achievement of the 10.5% percent share on the damage orders. While the expenses associated with the additional volumes of milk and with collecting the checkoff were not deducted from the basic checkoff figures, we note that they were deducted from a separate claim for bargaining expense checkoff fees.[20] We can see no reason to require NFO to twice deduct such expenses from its damage claim.

In addition, the appellees argue that the checkoff computation overstates NFO's losses because it fails to take into account NFO member dairy producers who did not market their milk through NFO but who, nonetheless, voluntarily contributed the three cent checkoff to NFO. They contend that NFO member milk producers are not required to market through NFO and that a number of NFO producer members chose to market their milk by some other means (including through one of the appellees). Therefore, to the extent that some NFO members who did not market through NFO voluntarily paid NFO the three cent per hundredweight checkoff, the damage claim is inflated.

The record indicates that NFO received the three cent checkoff from a number of its members who did not market through NFO and that this number was more than de

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[20]The additional expenses were for such items as salary for additional personnel, travel, taxes, insurance, and other miscellaneous items. *See* NFO Trial Exhibits Numbers 1003 (summarizing accounting expenses), 1004 (summarizing other expenses), 1007-11 (summarizing calculation of additional expenses).

minimis.[21] It does not, however, indicate whether the voluntary contributors pooled milk on any of the damage orders or the volumes they pooled. The question whether the voluntary contributors pooled milk on the damage orders is particularly important because, to the extent they pooled milk elsewhere, their voluntary contributions should not reduce the damage award. In other words, the

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[21]Ricardo Avila, an assistant director of NFO's dairy program testified on cross examination as follows:

> Q Now, Mr. Avila, do you know that in about 1973, approximately 1,700 dairy farmers were sending in check-off to the NFO even though they were not marketing through the NFO?
>
> A I believe I did. I believe I asked my secretary to put those figures together for me.
>
> Q Do you recall how many dairy farmers you determined were sending in their check-off to the NFO in 1974, even though they marketed their milk elsewhere?
>
> A If my memory is correct, I believe it was 254.
>
> Q Dairy farmers *in the whole country* or plants?
>
> A Dairy farmers.
>
> Q Is it your testimony that the number dropped from 1,700 in 1973 to 254 in 1974?
>
> A Whether it was '74 or '75, I don't recall. I do remember asking the secretary to put those figures together for me.

Trial Transcript at 4287-88 (emphasis added).

In addition, Albert Scott, another assistant director with NFO, testified as follows:

> Q [Y]ou also know that there are dairy farmers who market through marketing cooperatives who pay their dues to NFO, don't you?
>
> A Yes.
>
> Q And you know that there are dairy farmers, Grade A dairy farmers, who market through existing cooperatives who give a voluntary three-cent checkoff to the NFO, don't you?
>
> A There are some, yes.

Trial Transcript at 2809.

fact that an NFO member pooled milk through another marketing organization yet voluntarily contributed a checkoff fee to NFO, is only relevant if the milk on which the contribution was made was pooled on one of the damage orders.

Accordingly, NFO's failure to include voluntary contributions in its damage calculation is not a basis for totally rejecting it. Instead, NFO should be given an opportunity on remand to point out to the district court, from the *existing record,* evidence which will permit the court to make a reasonable approximation of the amount voluntarily contributed to NFO via the three cent checkoff from its members pooling milk on the damage orders who did not market milk through it.[22]

C. *Membership Dues*

[6] In addition to lost checkoff fees, our prior opinion recognized that NFO is entitled to recover membership dues for those members it would have added absent the restrictive practices. *NFO II,* 687 F.2d at 1209. Computing these dues, NFO first obtained from the USDA the yearly total of the number of producers pooling milk on each damage order. It then multiplied the total by the 10.5 percent yardstick measurement. This yielded an estimate of the number of producers NFO would have pooled in each year. *See* NFO Trial Exhibit No. 1024. NFO then subtracted from

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[22]If such information in the record is not identified, the district court would be justified in reducing the checkoff claim by an amount inferable from the existing record. For example, absent other evidence, a reasonable inference would be that all of the 1,700 contributors identified in the trial transcript at pages 4287-88 pooled milk on the damage orders. In addition, if the volume of milk these producers pooled is not identifiable, a reasonable inference would be that each of the voluntary contributors pooled an amount of milk equal to the average volume pooled by a producer in the relevant area.

this number the greater of the actual number of producers it pooled on each order or the estimated number of NFO producer-members on each order[23] to arrive at a conserva-

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[23]NFO purposely understated its damage figure by assuming that all existing NFO members who were dairy producers on a given order would market their milk with NFO (be "recaptured") before any non-member producers would do so. That is, in computing the number of "lost producers," the existing base of NFO members was required to be exhausted before any non-member producers were claimed.

This calculation required NFO to calculate the number of dairy producers pooling milk on each order who were also NFO members. The first step in the calculation involved determining NFO membership in each of the damage states. Using a membership list compiled in 1974, NFO estimated its active membership in 1970 (the year in which it made its first major effort to penetrate the damage orders) by removing from the 1974 list those who first became members after 1970 and those who were two years or more delinquent in their dues payments as of 1970. *See* NFO Trial Exhibit No. 1022. Next, NFO obtained from the United States Bureau of the Census the total number of farms in each state in the damage market as of 1969 and, by dividing the total number of farms in each state by the number of NFO members in each state, estimated the percentage of NFO membership in each of the damage market states. *See* NFO Trial Exhibit No. 1022.

Using the membership estimates, NFO calculated the number of its dairy producer members pooling milk on each damage order by obtaining from the USDA a summary of the number of dairy producers from each state pooling milk on each federal market order and multiplying that number by the percentage of NFO membership in each state. (Since NFO had no accessible information as to the percentage of its members in each damage state, or in the organization as a whole, who were dairy producers, it assumed for purposes of this calculation that the proportion of NFO member dairy farmers to the total number of dairy farmers in a state was similar to the proportion of NFO member farmers in a state to the total number of farmers in that state.) *See* NFO Trial Exhibit No. 1023.

tive estimate of the number of members it would have added absent the restrictive practices.[24] *See* NFO Trial Exhibit Nos. 1025-1034. Lost membership dues were then calculated by multiplying the number of members that would have been added by the net dues collected per member in each year.[25]

Appellees challenge NFO's calculation of lost membership dues on a number of grounds. First, as with the checkoff fee, they contend the calculation fails to adequately take into account the costs associated with the additional members. We disagree. Review of the record indicates that NFO deducted from its gross dues figures amounts representing the costs of additional personnel required to process the dues payments, the costs of sending the member an

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As an example of the calculation, in 1969, 2,771 producers from Wisconsin and 1,957 producers from Minnesota pooled milk on market order number 68. NFO estimates that 10.78% of farms in Minnesota and 7.42% of farms in Wisconsin were members of NFO. Multiplying the membership percentages by the number of producers, NFO estimates that 211 NFO member dairy producers from Minnesota (10.78% × 1,957) and 206 member producers from Wisconsin (7.42% × 2,771) pooled milk on order number 68. Since these two states were the sole source of milk pooled on order number 68, NFO estimates that it had 417 dairy producer members pooling milk on order number 68 (211 + 206). *See id.*

[24]For example, the record reflects that, on federal market order number 30, a total of 16,990 producers pooled milk. NFO calculated that it would have pooled 1,784 producers absent the restrictive practices (16,990 × 10.5%). Figures from the USDA indicate that NFO actually pooled 574 producers. NFO estimates its membership base on order number 30 at 1,173. Subtracting the greater of the number of actual producers (574) and the estimated membership base (1,173), NFO estimates that it lost 611 members (1,784 − 1,173). *See* NFO Trial Exhibit No. 1025.

[25]These net dues ranged from a low of $60.63 in 1973 to a high of $62.20 in 1972. *See* NFO Trial Exhibit Nos. 1025-34.

NFO newsletter, and the costs of providing each member with a membership card. *See* NFO Trial Exhibit Number 1006.

The appellees also contend that NFO's lost dues computation is fatally flawed because it assumes that the members NFO lost as a result of the unlawful conspiracy would have paid their dues. The appellees cite the fact that in 1975 NFO was owed nearly $48,000,000 in membership dues as supporting their contention. Thus, they argue it would be erroneous to assume that any members NFO would have added but for the unlawful conspiracy would have met their dues obligations.

Although there is evidence that NFO wrote off a substantial amount of dues receivable as uncollectible, the dues cannot be collected dues unless and until they are owed. Moreover, whatever merit there may be to the proposition that NFO has difficulty collecting dues from its general membership, the appellees made no showing that dairy producers who marketed their milk through NFO similarly failed to pay their membership dues.[26] Finally, even if the appellees had made such a showing, it would not properly lead to a complete denial of NFO's dues claim. Instead, the appropriate course would be to reduce the dues claim to reflect the probability that they would not be paid.

The appellees also challenge NFO's calculation of its membership base. First, they challenge the accuracy of the computer tapes from which NFO derived its membership estimate. Second, they contend that the assumption used by NFO to calculate the number of dairy producers on each

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[26]Indeed, our prior opinion recognized that NFO deducted certain marketing expenses from milk sales proceeds paid to its member producers. *NFO II*, 687 F.2d at 1209. From this, one could conclude that, if collection of dairy producer dues became a serious problem, the dues could be deducted from the proceeds of a member's milk sales.

order who were members of NFO was unreasonable. The assumption was that the proportion of NFO member dairy farmers to the total number of dairy farmers in a state was similar to the proportion of NFO member farmers in a state to the total number of farmers in that state. Third, they challenge NFO's use of a single time period in estimating its membership. They contend that, by limiting the membership calculation to those who were members in 1969, NFO overstated its damages to the extent that producers who joined NFO after that time and did not market their milk through NFO were included in the damage calculation. Fourth, they argue that the lost dues figure is inflated because it assumes that a producer will market milk on only one order.[27]

While each of the appellees' objections in this regard might have merit *in theory* insofar as they point out potential sources of error in NFO's damage calculation, the record is entirely lacking evidence showing *actual* error or evidence from which the award could be reduced to correct any errors. Rather, the appellees contend that the *potential* for error renders the damage evidence unreasonable and speculative. This Court, however, must review the record in light of the Supreme Court's admonition to observe the practical limits of proof in calculation of the amount of damages. *Zenith Radio Corp.*, 395 U.S. at 123, 51 S.Ct. at 1576; *supra* at 1293. Having done so, it is clear that, in the context of this case, the process by which NFO calculated its lost dues was just and reasonable. Accordingly, we hold that NFO's lost membership dues calculation is a proper element of its damage claim.

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[27]In this regard, AMPI Trial Exhibit Number 5491 purports to show that in October of 1976, 1,307 of its 4,895 members in an 11-order area pooled milk on more than one federal market order.

D. *Assumptions*

In addition to evidence concerning checkoff fees and membership dues, NFO presented evidence relating to a number of assumptions necessary to its damage calculation. Among these were assumptions concerning the time NFO would enter the various damage orders, the time it would take NFO to achieve its mature market share on the damage orders, the conditions on certain orders after their mergers, and the conditions on all of the damage orders in the intervening period from completion of the damage calculation to final judgment.

1. Time of Entry on Damage Orders

[7] NFO's damage calculation reflects its intention to move as rapidly as possible in entering each of the damage orders, yet recognizes that simultaneous and successful entry on all ten damage orders was not likely. Thus, the calculation assumes that NFO either did or would have marketed milk on federal order numbers 30, 62, 64, 106, and 126 beginning in 1970, on federal order numbers 60, 61, 68 and 73 beginning in 1971, and on order number 65 beginning in 1972. NFO's claim includes no damages for any years prior to actual or intended entry on each federal order.

The appellees contend that the dates of NFO's entry on each of the damage orders are erroneous and unsupported by the record. We disagree. Many of the same portions of the record cited with respect to the focus of NFO's efforts also support its claim as to entry on the damage orders. *See* Trial Transcript at 2548 (testimony of Al Scott); 1697-1700 (testimony of Oren Staley); 6443 (testimony of Donald Berkhahn). In addition, the unlawful acts of the appellees cannot be viewed in isolation from the context in which they occurred. *See NFO II*, 687 F.2d at 1193-94, 1208 (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962)). It

is indisputable that the unlawful conspiracy had a damaging effect on NFO's ability to expand as it had intended. Thus, we hold that the assumptions as to the dates NFO would have entered the damage markets are a reasonable element in NFO's damage calculation.[28]

2. Time to Achieve Mature Market Share

NFO's damage estimate also reflects the fact that it would not likely achieve its mature market share on each damage order in the same year it began marketing milk on that order. Instead, based on its experience in the test market order (federal order number 68),[29] NFO assumed that it would achieve its mature (10.5%) market share in three years with one-third of the mature share being achieved in each year.[30]

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[28]Insofar as NFO's assumptions as to dates of entry on the damage orders represent NFO's plans to expand, we note that this Court has stated:

> The Court does not believe that a going concern, which is the victim of an anti-competitive practice, must forego damages for sales it would have made as the result of natural expansion of its business simply because it was victimized early in its existence before its attempts to expand could ripen into evidence of preparedness and intent to increase output.

TV Signal Co. of Aberdeen v. American Telephone & Telegraph Co., 617 F.2d 1302, 1308 (8th Cir.1980) (quoting *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 968 n. 20 (5th Cir.1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978)).

[29]For a summary of NFO's share of the milk pooled on order 68 for the years 1971-75, see NFO Trial Exhibit Number 1225.

[30]For example, using federal order number 30, NFO either would have or did begin pooling milk on that order in 1970. NFO estimates that it would have pooled one-third of its mature market share of 10.5% in the first year, or 2,661,003 hundredweight, two-thirds of the 10.5% market share, or 5,621,516 hundredweight, in the second year, and the full 10.5% market share, or 8,705,792 hundredweight in the third year.

The appellees object to this assumption, arguing that NFO's performance on other market orders does not support it. In essence, the question of time to achieve mature market share is part and parcel of the larger question whether NFO's experience on order 68 may be used as a yardstick against which NFO's performance on the other damage orders may be measured. Therefore, consistent with our holding above that order 68 may reasonably be used as a yardstick, we hold that NFO's assumption, derived from its performance on that order is reasonable and was properly used in its damage computation.

3. Combination of Federal Orders and Post Computation Figures

[8] The damage calculation also includes assumptions as to damage orders that were merged with other orders. In 1975, several Texas federal market orders were merged with North Texas order number 126 to create a new federal order number 126. In 1976, federal order numbers 60, 61, and 68 were merged into a new federal order number 68. Since the mergers made calculation of damages on the merged orders nearly impossible, NFO assumed that conditions on each of the merged orders would remain the same as the last year prior to the merger.[31] *See* Trial Transcript at 9697-9700.

Similarly, the damage calculation also assumes that conditions on the market orders would remain essentially unchanged after 1977. This assumption provided a method by which NFO could predict the damages it would incur

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[31]For example, because federal order number 60 was merged into order number 68 in 1976, NFO assumed that the volume it would have pooled in each of the years subsequent to 1975 would remain at the 1975 level of 409,984 hundredweight. Similarly, NFO assumed that the number of producers it would have pooled on the order, had it continued to exist, would have remained at the 1975 level of 188. *See* NFO Trial Exhibit No. 1015; NFO Trial Exhibit No. 1026.

during the interval between completion of its damage calculation and final judgment in the case.[32] Accordingly, because the most recent figures available at the time of the damage calculation were for August of 1977, NFO used 1977 figures in its damage calculations for the three years following 1977, essentially assuming static conditions for the three-year period.[33] *See* Trial Transcript at 9658.

The district court held that the assumptions as to static conditions were unreasonable and not supported by the record. More specifically, the court rejected NFO's contention that the universe of producers from which it would derive its market share was static and found instead that the number of producers in the dairy industry was decreasing. *NFO III,* 614 F.Supp. at 790-91.

The flaw in the district court's approach is that, although the number of producers has decreased over time, the total volume of milk production has increased. In addition, the record reflects that the share of that production marketed by cooperatives has increased. *See* Trial Transcript at 14,421. Thus, to the extent that NFO's damages rest on the number of producers in the market, its assumption of a static situation may tend to overestimate its actual performance. However, to the extent that its damages rest on

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[32]NFO estimated, as it turns out quite optimistically, that judgment would be rendered by 1980.

[33]In addition, in 1977, the most recent figures available directly from the USDA were for 1975. The figures for 1976 are, therefore, based on information submitted monthly to the administrators of the relevant federal orders. Moreover, since, at the time of the damage calculation, figures were available for only the first eight months of 1977, the figures for that year are based on the twelve-month period ending August 31, 1977. In light of the Supreme Court's admonition to observe the practical limits of proof in calculating the amount of antitrust damages, *see J. Truett Payne Co.,* 451 U.S. at 566, 101 S.Ct. at 1929, we hold that these figures are properly included in NFO's damage calculation.

volume of milk marketed, its assumption of a static situation would tend to underestimate its actual performance. In any event, viewed as a whole, the record simply does not support the district court's rejection of NFO's damage evidence in its entirety on the basis of the decreasing number of producers. Accordingly, on remand, the district court shall afford NFO the opportunity to present evidence *on the basis of the existing record* from which its post-combination and postcomputation *membership dues claim* may be reduced to reflect the decrease in the number of producers.[34]

E. *Adjustments Not Included in the Basic Damage Estimate*

NFO's damage estimate included two elements in addition to checkoff fees and dues. These were bargaining expense checkoff fees and post relief damages.

1. Bargaining Expense Checkoff

[9] At various times during the damage period, NFO imposed a bargaining expense checkoff fee in addition to the three-cent per hundredweight basic checkoff fee. This checkoff fee was originally instituted in 1974 at two cents per hundredweight and was increased to six cents per hundredweight in 1976. This checkoff represents an additional element of NFO's claimed damages.

With respect to the two cent per hundredweight bargaining checkoff, NFO's damage calculation contained the assumption that, but for the restrictive practices, it would have imposed the checkoff in early 1972, some two and one-third years earlier than it was actually imposed. Therefore, it claims lost bargaining expense checkoff damages,

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[34]For example, one reasonable approach would be to calculate the average yearly percentage decrease in the number of producers on the damage orders from 1970 to 1977 and use that figure as a basis for reducing NFO's membership dues claim.

not only for the additional milk it would have marketed absent the unlawful conspiracy, but also for the milk that it actually did market during the two and one-third year period.

In calculating the former volumes—the milk it would have marketed but for the restrictive practices—NFO relied on the same figures it used in calculating its basic checkoff losses (the three cent per hundredweight checkoff). This volume totaled 77,438,179 hundredweight. *See* NFO Trial Exhibit No. 1040.

In computing the volume of milk actually marketed, NFO used its own figures for the years 1972-74.[35] This volume totaled 54,214,592 hundredweight. *See Id.*

NFO then multiplied the additional and actual volumes by the hypothetical two cent bargaining expense checkoff fee. This was done consistent with NFO's contention that, absent the appellees' unlawful conspiracy, the two cent checkoff would have been imposed at the beginning of 1972 instead of after one-third of 1974.

Thereafter, until 1976, the two cent checkoff applied only to the additional volume of milk NFO would have marketed but for the restrictive practices, reflecting the fact that NFO actually imposed the two cent checkoff in 1974. During 1976, NFO actually raised the bargaining expense checkoff fee to six cents per hundredweight. Reflecting the fact that the 1976 increase did not occur at the beginning of the year, NFO converted the 1976 checkoff fee to an annual figure of 5.7 cents per hundredweight.[36] Finally, from 1977 to 1980,

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[35]Since the checkoff was actually imposed after approximately one-third of 1974 had passed, NFO applied the two cent checkoff fee to one-third of its total actual volume for that year.

[36]The 5.7 cent figure accounts for the fact that NFO did not raise the checkoff fee from two to six cents until one month of 1976 had passed.

NFO used the full six cent per hundredweight figure, reflecting the assumption of static market conditions after 1977. *See* NFO Trial Exhibit No. 1005.

As a final step, after multiplying the actual and estimated volumes by the relevant checkoff fees, NFO deducted any additional expenses associated with obtaining and marketing the additional volumes.[37] Using this method, NFO estimated bargaining expense losses of $2,394,605. *See* NFO Trial Exhibit Nos. 1040, 1041.[38]

The appellees challenge as unsupported by the record NFO's contention that, but for the unlawful conspiracy, it would have imposed the additional two cent checkoff two and one-third years earlier than it actually did. NFO, on the other hand, cites the testimony of Gene Potter, an administrative coordinator with NFO in support of its contention. The testimony indicates that NFO waited until 1974 to impose the two cent checkoff because the growth of

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[37]Such expenses included such items as salaries, taxes, insurance and travel. *See* NFO Trial Exhibit Nos. 1003, 1004. As we have previously noted, *supra* at 1298, although the expenses are deducted from the bargaining expense checkoff claim, they are incurred in handling the additional volume of milk that achievement of a 10.5% market share entails. Accordingly, on remand, the district court should be certain that the expenses are deducted whether or not the bargaining expense claim is allowed.

[38]As an example of the lost bargaining expense calculation: using the year 1973, NFO actually marketed 24,810,366 hundredweight of milk, and using the 10.5% yardstick measurement calculates that it would have marketed an additional 10,939,142 hundredweight of milk. NFO's expenses associated with the additional volume were estimated at $182,172. Multiplying the volumes by the two cent per hundredweight checkoff NFO contends it would have imposed during the entire year, absent the restraints, NFO determined that it would have received an additional $532,818 in checkoff fees ((24,810,366 + 10,939,142) × .02 − 182,172). *See* NFO Trial Exhibit 1040.

the dairy marketing program was slower than had been anticipated. *See* Trial Transcript at 7985.

While it is clear that a failure to grow may serve as the basis for an antitrust damage award, *see, e.g., T.V. Signal Co. of Aberdeen,* 617 F.2d 1302, 1308 (8th Cir. 1980) (allowing antitrust damages for sales that would have been made as the result of natural business expansion), in this case Potter's testimony simply lacks sufficient information to form the basis of the award NFO claims. Specifically, the testimony does not indicate the earlier time at which NFO would have instituted the checkoff nor does it indicate that the additional checkoff would have been two cents had it been imposed at an earlier time. In short, apart from a generalized allegation of slower than anticipated growth, the record is devoid of evidence supporting NFO's contention in this regard. Thus, the contention may not properly form the basis for damages arising out of the hypothetical two cent checkoff fee NFO claims it would have imposed in 1972.[39]

With respect to NFO's other bargaining expense checkoff claims, the record reflects that it actually imposed a two cent per hundredweight checkoff in 1974 and increased that checkoff fee to six cents in 1976. We can discern no reason from the record why this additional checkoff should not be recoverable on the additional volume of milk NFO claims it would have marketed but for the unlawful conspiracy.

2. Post Relief Damages

[10] A final element in NFO's damage claim is for the post-judgment period it would require to regain the market position it would have occupied but for the unlawful conspiracy. In calculating such damages, NFO assumed that

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[39]According to our calculations, rejection of this portion of NFO's lost bargaining expense claim reduces its allowable damage claim by some $1,604,098.

relief would be granted in 1980 and that it would regain one-third of its mature share in each of the succeeding two years.[40] If, during the two-year period, the 1980 share plus the regained share exceeded the estimated share, no damages were claimed.[41] *See* NFO Trial Exhibit Nos. 1021, 1038.

Appellees challenge NFO's post relief damage claim as unsupported by the record. In assessing the claim, it is important to note that it is based on the same assumption that this Court did not completely accept with respect to NFO's post computation claim—that conditions on the orders would remain essentially static after 1977. *See supra* at 1303-1305. The 1980 figures, which served as the base from which one-third of the mature share was gained, necessarily involve the same assumptions as the post computation claim because they are actually 1977 figures which NFO assumed would remain unchanged through 1980. *See id; see also,* Trial Transcript at 9667.

The post relief claim is, however, more suspect than the post computation claim for a number of reasons. First, because it is dependent entirely on post computation figures, any error in those figures will necessarily be carried forward and compounded in the post relief figures. Second, the unlawful acts in furtherance of the illegal conspiracy

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[40]This assumption is similar to and consistent with the assumption that NFO would have achieved its mature (10.5%) share on each order in three years with one-third of the mature share being achieved in each year. *See supra* at 1302.

[41]At trial, NFO's damage expert assumed that judgment would be entered on January 1, 1980, and reduced the 1981 and 1982 damage claims to present value using a discount rate of 6.5%. On remand, since it was apparent that a judgment in the case would not be rendered until at least 1983, NFO deleted that portion of its damage claim. *See* NFO Brief in Support of Damages, Appendix A at 8.

occurred well before 1980. Thus, the post relief claim arises out of a time period even more distant from the unlawful conduct cited by this Court. Accordingly, NFO's post relief claim is not properly included as an element of its damages.[42]

F. *Adjustment to Reflect Lawful Competition*

Appellees finally contend that NFO's damage theory is defective because it fails to account for the effect on NFO of *lawful* competition. In support of their contention, appellees cite *MCI Communications v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied,* 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983). In that case, MCI filed an antitrust action against AT & T containing four counts and alleging twenty-two types of unlawful acts. At the close of MCI's case in chief, the district court directed a verdict in favor of AT & T on seven of the twenty-two alleged unlawful acts. The remaining fifteen were submitted to the jury.

As part of its proof at trial, MCI submitted damage evidence consisting of a lost profits study purportedly comparing the revenues it actually received or would receive with the revenues it expected to receive if it had been "undamaged." The figures for the "undamaged" MCI were derived from original business plans for the company.[43] After adjusting for taxes, MCI claimed damages in the amount of $900,000,000.

The jury found in favor of MCI on ten of the fifteen alleged unlawful acts and awarded $600,000,000 in damages. The

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[42]According to our calculations, rejection of NFO's post relief damages reduces its allowable damage claim by some $764,618.

[43]The study was written by MCI's former controller. The revenues projected for the "undamaged" MCI were based upon projections for the years 1973-84 made in 1971-72 which were primarily to be used for financing purposes.

trial court trebled the award to $1,800,000,000. On appeal, the Seventh Circuit reversed with respect to three of the ten alleged unlawful acts on which the jury had ruled in favor of MCI.

Considering the sufficiency of the damage evidence, the Seventh Circuit remanded for a recalculation of MCI's damages because MCI's damage proof improperly attributed all of its losses to AT & T's illegal acts. In other words, the Court rejected MCI's damage computation because it did not "establish any variation in the outcome depending on which acts of AT & T were held to be legal and which illegal." *MCI Communications,* 708 F.2d at 1163.

Building upon *MCI,* the appellees argue that NFO's damage claim must be *completely rejected* because it was not adjusted on remand to reflect the fact that certain alleged unlawful acts were later found to be lawful.[44] Such a position is at odds with the action of the MCI Court and cannot be accepted. While the damage award may have to be reduced so as to reflect only the damages caused by the unlawful conspiracy, it cannot be eliminated entirely.

[11] At base, an antitrust plaintiff's damages should reflect the difference between its performance in a hypothetical market free of all antitrust violations and its actual performance in the market infected by the anticompetitive

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[44]Specifically, they argue that our prior opinion establishes the legality of certain mergers and acquisitions of independent cooperatives, of the practice of pool loading, of certain litigation brought directly against NFO and of attempts to block NFO's qualification to pool milk on various market orders. *See NFO III,* 614 F.Supp. at 768. In addition, they argue that other claims brought by NFO were rejected by the district court at the original trial, which rejection was left undisturbed by this Court. Among these were: claims related to full supply contracts, base plans, retroactive competitive credits, and predatory acts against fourteen handlers of milk. *See id.*

conduct. *See Bigelow,* 327 U.S. at 264, 66 S.Ct. at 579 (approving of comparison of profits and values affected by the conspiracy "with what they would have been in its absence under freely competitive conditions"); *Dolphin Tours, Inc. v. Pacifico Creative Service, Inc.,* 773 F.2d 1506, 1511 (9th Cir.1985) ("In economic terms, the amount of damages is the difference between what the plaintiff could have made in a hypothetical free economic market and what the plaintiff actually made in spite of the anticompetitive activities."). *Cf. Rose Confections, Inc. v. Ambrosia Chocolate Co.,* 816 F.2d 381, 394-95 (8th Cir.1987) (rejecting damage theory because it assumed that plaintiff would have received the benefit of alleged price discrimination).

[12] Thus, if a plaintiff's business or property is diminished as a result of a competitor's lawful acts, no antitrust damages are recoverable for those acts. *See MCI Communications,* 708 F.2d at 1161. That is not to say, however, that a plaintiff's failure to prove with precision the amount by which the award should be reduced to reflect lawful competition will be fatal to its claim. Such a rule would ignore the Supreme Court's repeated recognition that, once the fact of injury is established, the plaintiff need only present evidence as to the amount of its damages sufficient to allow the finder of fact to make a just and reasonable estimate not based on speculation or guesswork. *See, e.g., J. Truett Payne Co.,* 451 U.S. at 566-67 n. 5, 101 S.Ct. at 1930 n. 5 (citing *Story Parchment Co.,* 282 U.S. at 562, 51 S.Ct.at 250).

[13] An antitrust plaintiff's damage claim is not, as the appellees suggest, rendered speculative or unreasonable merely because it fails to provide for a specific reduction in the event that allegations of certain unlawful conduct are rejected. In other words, if an antitrust plaintiff alleges that the defendant engaged in unlawful acts A, B, C, and D, and acts C and D are later rejected as a basis of liability, it does not automatically follow that the damage award must be

reduced. Rather, if acts A and B support the entire damage award, it must be sustained.[45]

Since the determination whether the unlawful acts can support the damage claim is largely a factual one, we must remand the case to the district court. On remand, the court shall afford the parties an opportunity to point out evidence *in the existing record* from which it may determine whether NFO's damage claim approved of herein should be reduced and, if so, the amount of such reduction. In considering such a reduction, we offer several guidelines to the district court.

First, in our prior opinion, we stressed the Supreme Court's admonition in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962), to avoid tightly compartmentalizing the plaintiff's proof. *NFO II*, 687 F.2d at 1193-94, 1208. We recognized that some of the appellees' conduct, if viewed in isolation, was lawful, yet formed part of the mosaic that constituted the unlawful conspiracy. *See NFO II*, 687 F.2d at 1193.

Separating the consequences of the unlawful from the consequences of the lawful will most certainly prove difficult. As the Supreme Court has stated, "[t]he vagaries of the marketplace usually deny us sure knowledge of what the plaintiff's situation might have been in the absence of

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[45]Indeed, in *Agrashell, Inc. v. Hammons Products, Co.*, 479 F.2d 269 (8th Cir.1973), this Court addressed a challenge to a jury award in favor of an antitrust plaintiff. In assessing the sufficiency of the plaintiff's damage evidence, the Court noted that the damage claim was based on the assumption that the defendant engaged in four types of unlawful conduct, one of which had been rejected by the district court and another of which was rejected by the Court on appeal. Nonetheless, the Court upheld the portion of the award based on the damage estimate, citing the policy that a violator of the antitrust laws should not profit from its wrongs.

the defendant's antitrust violation." *J. Truett Payne Co.*, 451 U.S. at 566, 101 S.Ct. at 1929.

[14, 15] Yet, the fact that the appellees' illegal conspiracy was composed of lawful and unlawful conduct so tightly intertwined as to make it difficult to determine which portion of the damages claimed were caused by the unlawful conduct should not diminish the recovery. Similarly, the Court should recognize that the harmful consequences of certain unlawful conduct may have been exacerbated by otherwise lawful conduct. In such a situation, the fact that lawful conduct contributed to additional injury should not prohibit recovery for that injury.

[16] Second, this case presents a situation in which one of the defendants, AMPI, ordered the destruction of documents allegedly relevant to this case. The destruction was characterized as involving "admitted bonfires." *NFO II*, 687 F.2d at 1205. In our prior opinion we stated:

> We can only describe AMPI's conduct as outrageous. Obviously, the relevance of and resulting prejudice from destruction of documents cannot be clearly ascertained because the documents no longer exist. Under the circumstances, AMPI can hardly assert any presumption of irrelevance as to the destroyed documents. On this record, the district court properly could have imposed the most severe sanctions upon AMPI—dismissal of its claims and default judgment against it on NFO's claim. Nonetheless, we cannot say it was an abuse of discretion not to do so. It was error, however, not to draw factual inferences adverse to AMPI on matters undertaken in or through offices and individuals involved in the destruction of documents.

Id. at 1205-06 (citations omitted).

Therefore, the fact that AMPI may have engaged in conduct in addition to the antitrust conspiracy outlined in our prior opinion which made proof of the amount of damage more difficult must be considered on remand.

Third, review of the record and our prior opinion establishing the fact of injury leave this Court with the definite and firm conviction that the amount of damages suffered by NFO as a result of the illegal conspiracy was substantial. The record simply will not support a finding that NFO is entitled to only nominal damages. In short, the appellees must not be allowed to "clip NFO's wings and then escape liability on the grounds that NFO cannot fly." *Id.* at 1210.

Finally, we emphasize that, in assessing the evidence as to the amount of damage, precision is not required. Rather, the district court must weigh the existing record evidence and arrive at a just and reasonable figure. We realize the task the district court is called upon to perform is not easy and is made all the more difficult by the formidable record in the case. Nonetheless, it is one that must be undertaken, lest the appellees be allowed to profit from what can only be characterized as a broad conspiracy undertaken in blatant disregard of the antitrust laws.

III. Injunctive Relief

In addition to the damage issues, we remanded for consideration of injunctive relief. On remand, the district court was to consider, inter alia, the extent to which consent decrees obtained by the United States in actions against Mid-Am and AMPI already provided NFO with sufficient relief.[46]

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[46]We stated:

> The only other question relates to injunctive relief and the possible mootness effect of the Mid-Am and AMPI consent decrees. NFO is plainly entitled to an injunction against the kind of unlawful conduct identified here. The district court is, of course, free to consider the extent to which the consent decrees provide NFO with sufficient, enforceable relief.

NFO II, 687 at 1210.

On remand, the appellees argued that injunctive relief is inappropriate because there is no evidence of any impending violation of the antitrust laws, and the injunction proposed by NFO merely duplicates sufficient relief already provided by consent decrees explicitly covering Mid-Am and AMPI and implicitly covering CMPC.

NFO responded that the consent decrees do not provide sufficient relief and, in any event, are not binding on CMPC. In particular, NFO argued that the decrees do not contain adequate enforcement mechanisms and that it is entitled to restorative injunctive relief designed to place it in the competitive position it would have enjoyed absent the illegal conspiracy.

The district court, with one exception, denied NFO's proposed injunctive relief as unwarranted and duplicative of the Mid-Am and AMPI consent decrees. The exception had to do with a proposed prohibition of sham litigation. With respect to sham litigation, the district court entered an injunction, despite the fact that it was satisfied the consent decrees were broad enough to cover sham litigation. It did so because the issue had never actually been decided and our prior opinion placed great emphasis on violations involving sham litigation. *See* 614 F.Supp. at 801-02.

Under the Clayton Act, 15 U.S.C. § 26, the district court has the duty and broad authority to fashion relief that will terminate the unlawful acts found to have occurred, ensure that they will not recur, and eliminate their consequences. *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 335 (8th Cir.1982), *rev'd on other grounds*, 727 F.2d 692 (1984) (en banc) (quoting *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697, 98 S.Ct. 1355, 1368, 55 L.Ed.2d 637 (1978); *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 250, 88 S.Ct. 1496, 1500, 20 L.Ed.2d 562 (1968)); *see also United States v. Glaxo Group Limited*, 410 U.S. 52, 64, 93 S.Ct. 861, 868, 35 L.Ed.2d 104 (1973) ("The purpose of relief in an antitrust case is 'so far as

practicable [to] cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.' "). In carrying out its duty, the district court has "large discretion to model [its] judgment to fit the exigencies of the particular case." *Paschall,* 695 F.2d at 335 (quoting *International Salt Co. v. United States,* 332 U.S. 392, 400-01, 68 S.Ct. 12, 17, 92 L.Ed. 20 (1947)).

[17] On appeal, NFO claims that it is entitled to injunctive relief even though the conduct complained of may be prohibited by the consent decrees. We disagree. Our prior opinion clearly recognized that NFO is not entitled to injunctive relief to the extent other existing relief is adequate. *See NFO II,* 687 F.2d at 1210, n. 38, 39. We have carefully reviewed the AMPI and Mid-Am consent decrees and have compared them with the injunction proposed by NFO. We conclude that, with the exception of the prohibition against sham litigation noted by the district court, they offer NFO substantially the same relief. In short, provided the provisions of the consent decrees can be reasonably enforced by NFO, there is nothing to be gained by entering an injunction that substantially duplicates the relief already available. *Cf. Hawaii v. Standard Oil Co.,* 405 U.S. 251, 261, 92 S.Ct. 885, 890, 31 L.Ed.2d 184 (1972) ("While the United States Government, the governments of each State, and any individual threatened with injury by an antitrust violation may all sue for injunctive relief against violations of the antitrust laws, and while they may theoretically do so simultaneously against the same persons for the same violations, the fact is that one injunction is as effective as 100, and concomitantly, that 100 injunctions are no more effective than one.").

Alternatively, NFO contends that the enforcement mechanisms in the consent decrees are inadequate to afford it meaningful relief. Pursuant to the consent decrees, NFO may bring an enforcement action by filing a request with the Assistant United States Attorney General in charge of the Antitrust Division and the district court alleging non-

compliance, the injury resulting therefrom, and the relief requested. The Assistant Attorney General then has twenty days to respond. A copy of the response must be sent to NFO and to the district court. If NFO is not satisfied with the government's response, it may petition the court to exercise its independent jurisdiction and to direct enforcement proceedings on its own motion. *See United States v. Associated Milk Producers, Inc.*, 394 F.Supp. 29, 57-58 (W.D.Mo.1975); *United States v. Mid-Am*, 1977 Trade Cases 61,508. Although the enforcement provision places an administrative burden on NFO and may involve a small delay, in view of the fact that the decrees clearly contemplate full and complete private enforcement, we cannot say that the district court erred in finding that the consent decrees offered NFO adequate relief.

NFO also claims that the consent decrees are inadequate because they are not binding on CMPC. The district court rejected this claim as "untenable." *NFO III*, 614 F.Supp. at 801. CMPC is a federation of cooperatives of which AMPI is a member and the sole marketing agent. The consent decree entered against AMPI is binding on "all persons in active concert or participation" with AMPI.[47] *United States v. Associated Milk Producers, Inc.*, 394 F.Supp. at 50. Accordingly, we affirm the district court in this regard.

Finally, NFO contends it is entitled to the restorative relief. The proposed relief consisted of five parts. Part one required the appellees, for a period of one year, to allow their members to terminate marketing agreements at any time on thirty days notice in order to join NFO. Part two required Mid-Am and AMPI to purchase milk from NFO under certain specified terms and conditions for a period of

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[47]In addition, paragraph XIII of the AMPI consent decree required it to furnish a copy of the decree to CMPC; thus, there is no question that CMPC has actual notice of the decree. *See United States v. Associated Milk Producers, Inc.*, 394 F.Supp. at 55.

five years. Pursuant to part three, if the appellees acquired a milk receiving or processing plant which bought milk from NFO during the twelve months preceding the acquisition, they would be required to purchase the same volume of milk NFO sold the plant in the preceding twelve months at the same price and terms as other milk received at the plant. Part four required CMPC to allow NFO to participate in its dairy surplus disposal program for the next five years under the same terms and conditions as other CMPC members. Part five prohibited the appellees from block voting their members' stock if the effect would be to terminate or amend any existing federal market order. NFO Proposed Injunction, Brief of Appellant, Addendum II, part p. at 7-10.

The district court carefully considered NFO's proposed restorative relief and found it unwarranted, duplicative, or inappropriate. We agree and affirm the district court's rejection of the requested restorative relief.

IV. Denial of Class Certification

In addition to the appeal brought by NFO, nine individual NFO members appeal the district court's refusal to certify a class of NFO member dairy farmers seeking to recover damages.

Shortly after this case was filed, it became apparent that issues concerning class certification would play an important role. As early as June of 1971, issues involving requests by both NFO and Mid-Am to certify a class of their respective members were discussed. Subsequently, the district court expressed to the parties on numerous occasions its view that other devices superior to a class action were available and that it was not inclined to grant the class certification motions. Accordingly, the district court requested the parties to try to reach an agreement on alternative methods for resolving standing and damage distribution issues. Attempts to reach such an agreement failed,

however, and at a pretrial conference in 1974, the district court denied NFO's request for class certification "without prejudice to later suggestions as to [the resolution of] the problems of distribution of damage." Transcript of Pretrial Conf. No. 20 at 31.[48]

After additional discussion, NFO moved the district court to reconsider the denial or, in the alternative, to certify the issue for interlocutory review pursuant to 28 U.S.C. § 1292(b). The district court denied the motion.[49] On January 21, 1981, the district court entered a final judgment in phase II of the case (involving NFO's counterclaim). At that time, no further motion with respect to class certification had been raised. The judgment stated, "It is Ordered and Adjudged that the plaintiff, The National Farmers Organization, Inc., take nothing and that this action be dismissed on the merits." *Alexander v. National Farmers' Organization* (W.D.Mo.1981).

NFO thereafter appealed to this Court from the judgment. Neither the individual class members nor the putative class appealed either the judgment or the previous denial of class certification. On appeal, this Court examined

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[48]Also at Pretrial Conference No. 20, Mid-Am sought and was granted leave to file a fifth amended complaint which did not seek recovery for any of its proposed class claims. Transcript of Pretrial Conf. No. 20 at 7-8.

[49]The status of NFO's class certification motion is most clearly ascertainable from a March 8, 1974, Pretrial Order which states:

> Any motion of NFO counterclaimants, including that filed February 1, 1974, for certification of a class consisting of NFO dairy farmers is hereby denied, without prejudice to the rights of any party to file subsequent motions, including a class action motion, with respect to the manner of processing claims which may be involved in this litigation. It may be refiled at any time. All other motions seeking a determination of certification of the class action have been withdrawn, and no request by any other party for a class action now pends before this Court.

the standing and damage issues and held that NFO could not recover damages resulting from the lower price it received for its milk. Instead, we held that such damages could be recovered only by the individual NFO members. *NFO II,* 687 F.2d at 1209.

[18] On remand, the individual NFO members again brought a motion to certify a class. The district court denied the motion, finding that NFO made a deliberate election to claim the price reduction damages as belonging to it and not to the class and that the failure to appeal the district court's original interlocutory order and judgment barred consideration of the class certification issue. Alternatively, the district court held that class certification would be improper because individual factual and legal issues concerning the amount and fact of damage predominated.

We agree with the district court that consideration of the class certification motion is barred. In *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), the Supreme Court addressed a situation in which two parties failed to join in a direct appeal from an adverse judgment and, in a later collateral proceeding, sought to take advantage of a reversal obtained by the appealing parties. The Court ruled against the non-appealing parties, holding that a final judgment on the merits, even if wrong or based on a subsequently overruled legal principle, precludes the parties or their privies from relitigating issues that were or could have been raised in the original action. *Id.* at 398-99, 101 S.Ct. at 2427-28.

The putative NFO class argues that *Moitie* is not applicable to this case because the 1981 judgment, by its terms, was entered against NFO and not against the class. We disagree. The fact that the 1981 judgment did not specifically run against the class claimants did not preclude their appeal from it. In *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977), the Supreme Court addressed a situation in which a United Airlines

flight attendant attempted to bring a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, challenging a rule requiring female flight attendants to remain unmarried as a condition of employment. The district court denied class certification, finding that the class could properly consist of only those attendants who, upon discharge for marriage, had filed claims under a fair employment statute or grievances pursuant to United's collective bargaining agreement. Thus, because the class so limited contained only thirty members, the district court refused certification on the ground that the class was not sufficiently numerous to render joinder of all members impracticable. The case then proceeded to a judgment in favor of the individual plaintiffs.

After entry of the judgment, McDonald, a member of the flight attendant class, as originally defined, who failed to challenge her discharge either to the EEOC or under the collective bargaining agreement, sought leave to appeal the denial of class certification despite the fact that individual plaintiffs had decided not to appeal. The district court denied the request as untimely. The Court of Appeals reversed, finding both that the request was timely and that the district court erred in narrowly defining the class. United appealed only the timeliness issue. The Supreme Court affirmed, finding that, "the entry of final judgment made the adverse class determination appealable." *Id.* at 394, 97 S.Ct. at 2469-2470.

The basic premise of *McDonald*—that a member of a class denied certification may appeal that denial upon entry of a final judgment in the case in which certification was denied—is directly applicable to this case. As in *McDonald,* the NFO class claimants were free to appeal the adverse class certification ruling, as well as any other rulings of the district court, once final judgment was entered on NFO's claims. Their failure to do so is preclusive.

To hold otherwise defies common sense. It would only be redundant for the district court to enter a final judgment against the class after it had already refused to recognize it. Moreover, since the claims of the class and of NFO arise out of many of the same operative facts and require application of the same laws, considerations of judicial economy and consistency argue strongly in favor of requiring the appeals of the class and of NFO to be heard at the same time. Accordingly, we affirm the district court's refusal to certify a class of NFO dairy farmer members.

V. Attorney's Fees and Costs

The antitrust laws provide that a plaintiff who recovers damages or who "substantially prevails" in an action for an injunction shall recover the costs of suit and a reasonable attorney's fee. 15 U.S.C. §§ 15 and 26. Mindful of the admonition in *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983), to avoid a "second major litigation," the district court denied, without prejudice, NFO's motion for attorney's fees and costs pending appeal to this Court.[50]

Specifically, the district court noted that under the standards set forth in *Hensley* and in this Court's application of *Hensley* in *Williams v. Mensey,* 785 F.2d 631 (8th Cir.1986), it must award attorney's fees in an amount that is reasonable in relation to the results obtained. *Alexander v. National Farmers' Organization,* 637 F.Supp. 1487, 1499-1500 (W.D.Mo.1986). In this regard, the district court stated:

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[50]The attorney's fee dispute will be substantial. The district court noted that, "NFO submitted a proposed order for an $18,280,668.50 award of attorneys' fees. That award is based on 75,379.64 partner hours, 44,401.99 associate hours, and 33,672.93 law clerk and paralegal hours." *Alexander v. National Farmers' Organization,* 637 F.Supp. 1497 n. 22 (W.D.Mo.1986).

> [A]ny attorney's fee award that this Court may make at this time, would necessarily have to be based on the results that NFO has up to this point obtained in the district court. Any award of attorney fees that would be based on judgments that are subject to immediate appellate review would be nothing more than an exercise in futility unless it is assumed that this Court will eventually be affirmed on the judgments that will be entered on both the damage issue and equitable relief issue. Based on its experience with the parties, the Court is confident that the parties will not be in agreement that such an assumption should be made. We are accordingly satisfied that the extent of NFO's success or lack of success should be finally determined on appeal before this Court embarks on what promises to be a second major litigation in connection with NFO's request for an attorney's fee award.

Id. at 1500.

Thus, rather than undertaking the time-consuming task of determining a reasonable attorney's fee, only to see the effort overturned on appeal, *see, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) (overturning entire attorney's fee award); *Paschall v. Kansas City Star Co.*, 727 F.2d 692 (8th Cir.1984) (en banc) (same), the district court wisely deferred ruling on attorney's fees and costs pending appeal.

In light of our decision herein finding that NFO is entitled to a substantial damage award in addition to the injunctive relief obtained in the district court, it is clear that the time has now come for the district court to address the question of attorney's fees and costs. Accordingly, we remand to the district court with directions to it to determine the amount NFO should be awarded for reasonable attorney's fees and costs it incurred in the district court.[51]

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[51]NFO also appeals from the district court's finding that NFO was only entitled to interest on this Court's award of attorney's fees and costs incurred in bringing the initial appeal at a rate of

Finally, in accordance with our prior opinion in this matter, *see Alexander v. National Farmers' Organization, Inc.*, 696 F.2d 1210 (8th Cir.1982), NFO may move this Court for an award of expenses incurred in pursuing this appeal. Such expenses may include attorney's fees, court costs, and other miscellaneous costs.

VI. Conclusion

In summary, from our prior opinion and the record in this case it is clear that NFO has established that the appellees engaged in a broad conspiracy in violation of the antitrust laws and that the conspiracy caused it a substantial amount of damage. Accordingly, we remand to the district court for computation of the amount of damages. In computing that amount, the district court shall accept the "test market" theory propounded by NFO as a valid base from which to determine the amount of damages and shall use the $7,403,374 claimed under the theory as a starting point.

In accordance with this opinion, that figure shall be reduced by $1,604,098, reflecting our rejection of NFO's claim that it would have imposed a two cent bargaining expense checkoff fee in 1972, rather than in 1974, and by $764,618, reflecting disallowance of post relief damages. In addition, the district court shall make certain the damage award reflects the expenses associated with handling the additional volume of milk NFO would have marketed had it achieved the 10.5% test market share.[52]

8.72% commencing on May 31, 1983. NFO contends that interest should properly accrue at a rate of 12.4% from August 31, 1982, the date this Court entered judgment for the fee award. Having carefully considered NFO's arguments, we affirm the district court in this regard.

[52]The reduction should be ascertainable from the existing record. Along these lines, we note that for the years 1970-77, NFO has deducted such expenses from its bargaining expense checkoff

The district court may also, in its discretion, further reduce the damage award to reflect the following:

(1) the voluntary checkoff fee contributions of NFO members pooling milk on the damage orders through milk marketers other than NFO;

(2) an appropriate reduction of NFO's post order combination and post computation membership dues claim due to an overall decrease in the number of producers; and

(3) an adjustment, if any is necessary, for the effects of alleged unlawful conduct later found to be lawful.

In considering the discretionary reductions, the district court shall keep in mind the admonition in the Supreme Court opinions and in this opinion that NFO need not prove its damages with unnecessary precision. Rather, the damages awarded need only be just and reasonable in light of the practical limits of proof in a case of this nature. Finally, once the district court has determined a just and reasonable award, that amount shall be trebled in accordance with section 4 of the Clayton Act, 15 U.S.C. § 15.

We also deny NFO's requests for additional injunctive relief and to certify a class of its dairy farmer members. We remand to the district court for a determination and award of a reasonable attorney's fee and costs. NFO may make

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claim. We have, however, held that such expenses are attributable to the additional volume serving as the basis of both the three cent checkoff and the bargaining expense checkoff. Therefore, the expenses must be deducted for the 1972-74 period, even though we have rejected the claim that, absent the illegal conspiracy, NFO would have instituted a two cent bargaining expense checkoff. In addition, we have been unable to locate in the record an estimate of the expenses NFO would have incurred in marketing the mature volume of milk in the years 1978-80. On remand, the district court shall determine the amount of such expenses and reduce the award accordingly.

application to this Court for any attorney's fees and costs it reasonably incurred in pursuing this appeal.

Accordingly, the judgment of the district court is affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-1046

NATIONAL FARMERS' ORGANIZATION, INC.,

Appellant,

NATIONAL FARMERS' ORGANIZATION
DAIRY FARMER CLASS,

v.

ASSOCIATED MILK PRODUCERS, INC.,
MID-AMERICA DAIRYMEN AND
CENTRAL MILK PRODUCERS COOPERATIVE,

Appellees.

No. 87-1047

NATIONAL FARMERS' ORGANIZATION, INC.,
NATIONAL FARMERS' ORGANIZATION
DAIRY FARMER CLASS,

Appellant,

v.

ASSOCIATED MILK PRODUCERS, INC.,
MID-AMERICA DAIRYMEN AND
CENTRAL MILK PRODUCERS COOPERATIVE,

Appellees.

Appeal from the United States
District Court for the
Western District of Missouri

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the district court is affirmed in part, reversed in part and remanded to the district court for further proceedings consistent with this opinion. It is further decreed that the district court determine and award appropriate attorney's fees and costs. NFO may make application to this Court for any attorney's fees and costs which it reasonably incurred in pursuing this appeal.

July 5, 1988

The National Farmers' Organization will recover from Associated Milk Producers, Inc., Mid-America Dairymen and Central Milk Producers Cooperative the sum of $1,087.50.

Order entered in accordance with opinion.

Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-1046/1047-WM

NATIONAL FARMERS' ORGANIZATION, INC.,
Appellant,

vs.

ASSOCIATED MILK PRODUCERS, INC., et al.,
Appellees.

Appeals from the United States
District Court for the
Western District of Missouri

Petition for rehearing en banc filed by appellees' Associated Milk Producers, Inc., Mid-America Dairymen, Inc. and Central Milk Producers, Inc., has been considered by the Court and is denied.

Judges Bowman and Magill would have granted the petition.

Petition for rehearing by the panel is also denied.

September 13, 1988

Order entered at the Direction of the Court:

Robert D. St. Vrain

Clerk, United States Court of Appeals, Eighth Circuit.

NFO III

(614 F.Supp. 745)

APPENDIX E

ROBERT B. ALEXANDER, *et al.*,
Plaintiffs,

v.

NATIONAL FARMERS' ORGANIZATION, *et al.*,
Defendants and Counterclaim Plaintiffs,

v.

ASSOCIATED MILK PRODUCERS, INC., *et al.*,
Counterclaim Defendants.

No. 19191-A-1

United States District Court
W.D. Missouri, W.D.
July 5, 1985.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW ON REMAND

JOHN W. OLIVER, Senior District Judge.

The parties agreed that ten major issues were presented by the various motions and voluminous briefs and appendices filed after the Court of Appeals' remand. After the Court had read and considered all the post-remand briefs that had been filed, nine of those major issues were the subject of three days of oral argument.[1] The parties waived oral argument to the tenth issue and agreed that it should be decided on the briefs that had been filed.

After oral argument the parties presented an agreed order directing further proceedings in regard to each of the ten major issues presented. The paragraphs of that post-oral argument order were designed to track with the order in which the various issues had been orally argued.

This memorandum opinion, which will serve as our findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, will track with the paragraphs of the post-oral argument order. During the course of this memorandum opinion we will frequentlyrefer to the counterclaim plaintiff as "NFO" and to the counterclaim defendants as "defendants."

Our consideration of the arguments of the parties required that we study the entire transcript of the testimony of all the witnesses and exhibits adduced on the issue of damages. We were also required to study a substantial portion of the testimony of a substantial number of other witnesses and other exhibits adduced on questions other than damages during the trial of the entire case. In addition, we have reviewed and considered the handwritten

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[1]The 550-page transcript of oral argument, to which some reference will be made, has been filed as a part of the record on remand.

notes we made during the trial of the case which, in accordance with our established practice in non-jury cases, included our contemporaneously recorded reaction in regard to the credibility of the various witnesses as they testified and of the various exhibits as they were adduced in evidence at trial.

It is, of course, impossible for the Court to comply with the mandate of Rule 52(a) that "judgment shall be entered pursuant to Rule 58" at this time. For, as will be apparent from our determination of the various issues, a number of those issues are not in procedural posture for the entry of a final judgment.

A number of interlocutory orders will, however, be entered during the course of this memorandum opinion in regard to particular issues. Appropriate procedures will be directed under which final judgments may be simultaneously entered in regard to the interlocutory orders entered in regard to those issues and in regard to the orders that will later be entered in regard to all ten of the issues presented after remand. We turn now to the first issue presented after remand.

ISSUE NO. 1—STANDING—DEFENDANTS' RENEWED JOINT MOTION TO DISMISS

After remand, defendants CMPC, AMPI, and Mid-Am, filed a renewed joint motion to dismiss NFO's damage claims for lack of standing. That renewed motion was based primarily on the defendants' view of *Associated General Contractors v. Carpenters,* 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) and their view of the Eighth Circuit's application of the principles stated in that case in *McDonald v. Johnson & Johnson,* 722 F.2d 1370 (8th Cir.1983).

Defendants contended at oral argument that the granting of the renewed motion to dismiss for lack of standing would end the need for further inquiry in regard to any other question that might be presented on remand in that such a

ruling would constitute a determination that NFO would not be able to recover any damages in this case. (Oral Argument: p. 51-52).

The Court of Appeals accepted the defendants' argument that "NFO cannot recover its asserted 'price reduction' damages." *Alexander v. National Farmers Organization*, 687 F.2d 1173, 1208 (8th Cir.1982). However, that court expressly rejected "defendants attempt to bootstrap from this price reduction issue to deny NFO standing to recover any damages." *Id.* at 1209.

[1] The Court of Appeals made a number of specific factual findings in the course of its discussion of the standing question. It found that NFO transacted business through the NFO Dairy Trust; that NFO cannot be considered in isolation from the NFO Dairy Trust; that NFO and the NFO Dairy Trust were *not* a mere conduit for monies to pass from buyers to producers; that buyers of NFO milk arranged purchases through NFO, and not through individual farmers; that buyers, terminating purchases in the face of defendants' harassment, sent notice of such termination to NFO and not to individual farmers; that buyers dealt with NFO as a single entity; that buyers viewed the trust arrangement, if at all, as a bookkeeping matter; that the trust fund was not a mechanical pass through device; that NFO reblended the proceeds of its marketing efforts through the trust; that NFO determined the actual pay price to producers; that NFO deducted marketing expenses from the trust proceeds; that NFO's marketing program was in direct competition with the defendant co-ops; that NFO, as a competitor, was a direct target of the unlawful conspiracy; that NFO was not an indirect or derivative victim of actions aimed at individual farmers; that NFO earned net revenues in the form of membership dues and check-off fees; and that NFO's losses of dues and fees represent direct injury to its business or property.

Many of the findings of fact made by the Court of Appeals are inconsistent with any number of the findings of fact proposed by defendants in the appendix attached to the defendants' pending standing motion. We are satisfied that the parties and this Court must accept the findings of fact made by the Court of Appeals. We are equally satisfied, contrary to defendants' basic contention, that the Supreme Court did not make any substantial change in antitrust law when it handed down *AGC*. Nor did the Eighth Circuit when it decided *McDonald v. Johnson & Johnson*.

We shall therefore enter an interlocutory order denying defendants' renewed motion to dismiss NFO's damage claims for lack of standing. Accordingly, it is

ORDERED (1) that defendants renewed joint motion to dismiss NFO's damage claims for lack of standing should be and the same is hereby denied.

ISSUE NO. 2—NFO'S RULE 37 MOTION FOR MONETARY SANCTIONS AGAINST DEFENDANTS

I.

NFO's Rule 37 motion, filed solely against AMPI, prays for an order awarding NFO the following monetary sanctions:

1. NFO's costs, fees and expenses incurred in connection with uncovering AMPI's suppression and destruction of evidence in an amount to be determined;

2. NFO's costs, fees and expenses incurred in connection with pursuing relief under Rule 37, in the amount of $182,942.53;

3. NFO's costs, fees and expenses incurred in connection with defending the claims brought by AMPI in Phase III of this litigation, in an amount to be determined;

4. An additional amount equal to one percent of AMPI's 1982 gross revenues; and

5. Such other amounts as this Court may deem just and proper.

NFO's suggestions in support of that motion accurately state that this Court determined in November of 1978 that NFO's Rule 37 motion against AMPI would be granted and that the imposition of sanctions would be deferred until after the appeals in this case were resolved.

NFO argues that "this Court's determination that Rule 37 sanctions should be imposed has been emphatically endorsed and even broadened by the Court of Appeals, leaving only the question of the particular sanctions that should be imposed in order to achieve the purposes of Rule 37." NFO therefore contends that at least two considerations support its request that sanctions should be imposed in an amount not less than $26,347,780; namely "(1) AMPI's conduct was properly labeled by the Court of Appeals as 'egregious' and 'outrageous' and cannot be characterized as merely negligent or inadvertent; it was rather deliberate, pervasive, carried out at the highest levels of AMPI and involved not just delay but irretrievable destruction of evidence. It thus presents this Court with a record of wrongdoing which surpasses anything in the annals of Rule 37" and "(2) [m]any of the forms of sanctions available under Rule 37—*e.g.*, claim preclusion, costs of pursuing the Rule 37 motion, striking of pleadings, etc.—would be futile here because NFO has already won on the merits of its claim, and on AMPI's counterclaim, and NFO is already entitled to attorneys' fees and costs, as the prevailing plaintiff in an antitrust case; accordingly, many of the customary forms of sanctions would not materially serve the compensatory and deterrent purposes of the Rule." (NFO's Sugg. in Support at 5-6).

NFO suggests that this Court (a) determine that NFO "is entitled to the fees and expenses incurred in uncovering

AMPI's suppression and destruction of evidence and in pursuing this Rule 37 motion." (*Id.* at 6-7). Specifically, NFO requests that this Court "endorse the principle that NFO is entitled to compensation for the expenditures and for the hours devoted to the Rule 37 effort." (*Id.* at 7). NFO adds that "[u]pon the receipt of such a ruling, the parties may then confer in an effort to arrive at an agreed-upon figure." (*Id.* at 7). NFO also requests that compensation for this and all other sanction items be calculated at "the higher billing rates in effect today, in order to adjust for inflation and to avoid rewarding delay." (*Id.* at 8).

In a similar manner, NFO proposes that "this Court endorse the principle that NFO is entitled to compensation for items, such as the San Antonio Grand Jury costs—again at current rates—and leave the specific allocation task to the efforts of counsel, at least in the first instance." (*Id.* at 10).

NFO directs attention to the Court of Appeals' statement that "the district court properly could have imposed the most severe sanctions upon AMPI—dismissal of its claims and default judgment against it on NFO's claim." (*Alexander v. NFO, supra,* 687 F.2d at 1205; *see* NFO's Sug. at 12.) NFO contends that the "remedial purposes of the Rule would thus be served if this Court requires AMPI to compensate NFO for all its costs and fees incurred in defending AMPI's Phase III claim." (*Id.* at 12). NFO again suggests that "the Court adopt this sanction in principle at this time." (*Id.* at 13).

And finally, NFO, with primary reliance upon *Litton Systems, Inc. v. American Telephone & Telegraph Co.,* 700 F.2d 785 (2d Cir.1983), requests that this Court impose a fine of at least $26,347,780 on AMPI for the reason that such a sanction is "the *only* available sanction which could advance the deterrence goal" of Rule 37. (NFO Sugg. in Support at 14, NFO's emphasis).

II.

AMPI argues that "NFO is seeking a windfall" (AMPI's Suggestions in Opposition, p. 2); that "[t]o award NFO additional relief on top of the adverse inferences already drawn by the Court of Appeals . . . would be unjust" and that "NFO has failed to demonstrate any reason why it should be accorded any relief beyond that which already has been bestowed upon it by the appellate court." (*Id.* at 2); that "NFO has failed to show any prejudicial impact resulting from the challenged conduct"; that "NFO engaged in document suppression and destruction of its own" (*Id.* at 3); that "NFO's proposals are grossly overreaching"; and that "[g]ranting NFO's requests would constitute a miscarriage of justice under the circumstances." (*Id.* at 10). AMPI further argues that "[i]f this Court decides to award additional, monetary sanctions, such a deflator [as that applied by the Court of Appeals], applied to both hours and hourly rates, is appropriate here." (*Id.* at 12).

AMPI, as did NFO, made appropriate recognition of this Court's letters of August 12 and August 25, 1983 (which directed attention to the Supreme Court's admonition in *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1982), that "an application for attorney's fees should not and need not result 'in a second major litigation' ") and stated that "[i]n accordance with this Court's admonition, the parties will confer in good faith about fees when and if this Court determines that compensation for particular activities is appropriate." (*Id.* at 13).

III.

It is apparent from what we have stated above that both NFO and AMPI indicated in their respective briefs that they were willing to confer in good faith in regard to the amount of any attorneys' fees and expenses that might be awarded by way of Rule 37 sanctions. That willingness was

confirmed at oral argument. The agreed post-oral argument order provided:

> 2. *SANCTIONS—Rule 37 NFO Motion Against AMPI.* The parties shall meet, confer, and attempt to reach agreement on those portions of NFO's motion for costs, Appendix A, totalling $167,717 in attorneys fees and $15,225 in disbursements, together with items NFO is claiming in relation to the San Antonio grand jury proceeding. Commencing June 4, 1984, NFO shall make available to counsel for the counterclaim defendants all underlying records to substantiate those claims for Rule 37 attorneys fees and costs. Commencing June 14, 1984, NFO shall likewise make available to counsel for counterclaim defendants all underlying records to substantiate its claims for costs and fees relating to the San Antonio grand jury matter.
>
> On or about June 25, 1984 counsel shall submit to the Court a report indicating which items of Rule 37 and San Antonio grand jury costs and fees are agreed and those which remain in dispute. Agreement by the counterclaim defendants that any particular costs were incurred by NFO shall not constitute an admission, or a waiver of any argument by counterclaim defendants that the agreed upon expenditure was reasonably or necessarily incurred or is recoverable as a matter of law.
>
> In conjunction with its Rule 37 motion NFO has also claimed attorney fees and costs in defense of Phase III of the litigation. Because the Phase III costs and fees overlap, at least in part, the same category of fees and costs claimed by NFO in its Cost petition, and because resolution of the issue will necessarily entail a direct apportionment of those costs, NFO's Rule 37 request for Phase III attorney's fees and costs shall be handled in conjunction with the resolution of this issue in the context of NFO's Cost petition and in the manner set forth in Paragraph 10 below.

Mr. Donohoe's June 29, 1984 letter and Mr. Barnes' sequel letter of July 10, 1984 both advised the Court that NFO's and AMPI's negotiations pursuant to paragraph 2 of this Court's May 31, 1984 order have been unsuccessful.

IV.

The transcript of the proceedings held November 20, 1978 shows that this Court refused to impose the sanction of default or dismissal against AMPI because it believed that to have done so would have been contrary to the construction placed on Rule 37 by several then recent decisions of our controlling Court of Appeals. Pages 12,214 and 12,215 of the transcript reflect our citation of the then most recently decided Eighth Circuit case of *Schleper v. Ford Motor Co., Auto Div.*, 585 F.2d 1367 (8th Cir.1978). We also directed attention to *Edgar v. Slaughter*, 548 F.2d 770 (8th Cir.1977) which, as did *Schleper*, had cited *Fox v. Studebaker-Worthington*, 516 F.2d 989 (8th Cir.1975), with approval.

We further noted that *Edgar* had quoted Judge Van Oosterhout's statement in *Fox* to the effect that "[t]here is a strong policy favoring a trial on the merits and against depriving a party of his day in court." *Edgar, supra*, 548 F.2d at 772. (Tr. 12,215).

The Note entitled "The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions," 91 Harv.L.Rev. 1033, accurately reflected that the Eighth Circuit's policy as expressed in *Fox* was consistent with the views expressed by most courts until the Supreme Court handed down its brief per curiam opinion in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976). While that Note urged a "[t]ougher use of Rule 37 sanctions, and of dismissal and default judgments in particular" (*id.* at 1055), it conceded that "[t]he view of discovery sanctions reflected in *National Hockey League* and other recent cases has not yet been fully developed" and that "[s]everal questions pertaining to the way in which sanctions will be administered under this view remain unanswered" (*id.* at 1047).

National Hockey League was, of course, on the books at the time the Eighth Circuit in *Edgar* reiterated its Rule 37

policy favoring a trial on the merits rather than the imposition of a default or dismissal sanction under Rule 37. And the Court of Appeals cited *Fox* to support its conclusion that this Court did not abuse the discretion vested by Rule 37 when it elected to follow the policy stated by the Court of Appeals in that 1975 case.

The Court of Appeals, however, in this case emphatically stated its view that "[w]e can only describe AMPI's conduct as outrageous." *Alexander v. NFO, supra,* 687 F.2d at 1205.

While the Court of Appeals did not cite *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), it is clear to this Court that the Court of Appeals had in mind the Supreme Court's admonition in that case which, quoting *National Hockey League,* stated that "Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.' " *Roadway Express, supra,* 447 U.S. at 763-64, 100 S.Ct. at 2462-63.

In short, we are satisfied that the Court of Appeals has implicitly directed this Court to penalize AMPI for conduct which the Court of Appeals characterized as "egregious" and "outrageous" and also to impose sanctions which will deter others who might be tempted to such conduct in other cases.

Judge Conner's district court imposition of sanctions was affirmed by the Second Circuit in *Litton Systems, Inc. v. American Tel. & Tel. Co.,* 700 F.2d 785 (2d Cir.1983). As did this Court, Judge Conner first ruled the merits of the defendant's Rule 37 motion but deferred his decision on the sanctions to be imposed until after the conclusion of the trial. See *Litton Systems, Inc. v. American Tel. & Tel. Co.,* 90 F.R.D. 410, 421 (S.D.N.Y.1981). Judge Conner's opinion imposing sanctions is reported in 91 F.R.D. 574 (S.D.N.Y.1981). That opinion shows that the defendant was insisting upon the extreme sanction of dismissal because of

plaintiff's failure to comply with discovery orders rather than the imposition of a lesser sanction. Judge Conner, in reliance upon both *Roadway Express, Inc. v. Piper* and *National Hockey League* held that:

> Our adversarial system of civil justice rests upon access of all parties to all evidence bearing on the controversy between them, including that in the control of adverse parties. This, of course, requires the absolute honesty of each party in answering discovery requests and complying with discovery orders. Destruction or concealment by a party of relevant documents in its files threatens the viability and public acceptance of the system.

Litton Systems, supra, 91 F.R.D. at 576.

Judge Conner added that:

> "Among the factors to be considered in determining what sanction is appropriate for a willful failure to make discovery are the importance of the information sought; the offending party's record of cooperation in other respects; whether and in what circumstances it ultimately produced the information; the extent of prejudice occasioned by the delay in its production; and public policy aspects of the litigation."

(*Id.* at 576).

Judge Conner concluded that apart from the conduct which he discussed in both of his district court opinions, that "the discovery conduct on both sides in this case has been generally good." (*Id.* at 577). We find that the same thing was generally true in this case. In *Litton* all the documents that were withheld were ultimately produced. Except for the relatively small number of the unknown documents that were destroyed, the same thing is true in this case. Furthermore, no one has attempted to make the untenable argument that any of the destroyed documents could have in any way related to the amount of damages which NFO claims in this case.

We have carefully weighed the factors which control the imposition of sanctions as above discussed, including but not limited to public policy considerations, and conclude that NFO is entitled to an order imposing sanctions as generally prayed for in its Rule 37 motion with one exception. We do not believe it is either proper or appropriate to impose an additional amount of monetary sanctions equal to one percent of AMPI's 1982 gross revenues as prayed for in paragraph 4 of NFO's Rule 37 motion.

The interlocutory orders to be entered, of course, cannot state specific amounts because the hope that the parties would be able to agree on those amounts has not been realized. Because of that factor we also defer ruling the question of whether NFO's counsel should be compensated at the higher billing rates in effect today as specifically prayed for in paragraph 2 of its motion and generally prayed for in regard to paragraphs 1 and 3 of its motion. For the reasons stated, it is

[2] ORDERED (1) that this Court endorses the principle that NFO is entitled to compensation for the efforts devoted to its Rule 37 motion. The parties are accordingly directed again to confer in an effort to arrive at an agreed figure. It is further

ORDERED (2) that this Court also endorses the principle that NFO is entitled to the compensation in connection with the San Antonio grand jury proceeding. The parties are accordingly directed to confer in the same manner in that regard. It is further

ORDERED (3) that this Court endorses the principle that NFO is entitled to be compensated for at least some of its costs and fees incurred in defending AMPI's Phase III claim. The parties are accordingly directed again to confer in the same manner in that regard. The extent to which the total costs and fees incurred in defending AMPI's Phase III claim will be determined after review of NFO's claim in that

regard, and after review of the agreement, if any, of the parties in that regard. It is further

[3] ORDERED (4) that it would be unjust under all the circumstances for this Court to exercise its discretion in favor of NFO's prayer stated in paragraph 4 of its motion that AMPI, in effect, be fined the sum of $26,347,780, the alleged equivalent of one percent of AMPI's gross annual revenues. That portion of NFO's Rule 37 motion should be and the same is hereby denied.

ISSUE NO. 3—AMPI'S MOTION AGAINST NFO FOR SANCTIONS

I.

Following remand, AMPI filed a memorandum and suggestions in further support of (1) its April 18, 1975 Motion For Order For NFO To Show Cause Why It Should Not Be Held in Contempt and a Motion for Order Compelling Discovery and (2) in support of its April 21, 1976 Motion For Order Declaring NFO In Contempt.

The relief sought by those motions requested dismissal of NFO's market penetration claims as a sanction for the alleged "cleanout" of NFO's home office in anticipation of document production and for NFO's alleged failure and delay in producing various documents in a timely manner.

NFO's memorandum in opposition points out that all of the exhibits attached to AMPI's memorandum and suggestions were earlier filed with the Court of Appeals. NFO therefore argues that AMPI implicitly submitted to the Court of Appeals the issue as to whether this Court erred in not granting AMPI's motions. Indeed, AMPI argues that the Court of Appeals necessarily considered and ruled upon AMPI's motions for sanctions for the reason that the Court of Appeals did not impose any sanctions on NFO. NFO argues that the Eighth Circuit's mandate puts AMPI's

motions "out of the reach of this Court on remand" and that "this Court is foreclosed and relieved from ruling upon them now."

AMPI's reply to that argument suggests that the very principles espoused by NFO in opposing AMPI's motion for sanctions would be directly applicable to NFO's Rule 37 motion for sanctions and that NFO, having received the sanctions it requested from the Court of Appeals, must be deemed to have abandoned any claim for the monetary sanctions for which they now contend on remand.

We conclude that an order should be entered consistent with paragraph 3 of this Court's May 31, 1984 order which was agreed to by all parties.

II.

Examination of Exhibit F, AMPI's January 24, 1977 narrative based on then existing discovery in support of AMPI's motions, and Exhibit G-1, which was the February 22, 1977 NFO answer to that narrative statement, establish that NFO's admissions, standing alone, establish, at the very least, that substantial delay was involved on the part of NFO in its production of particular documentary evidence in this case. NFO's outright denials of particular paragraphs of AMPI's narrative and NFO's guarded and qualified admissions of other paragraphs establish the existence of a substantial conflict in the testimony of particular witnesses whose depositions were eventually taken.

AMPI's April 19, 1977 reply to NFO's suggestions in opposition to AMPI's motion emphasized that the obvious conflict in the testimony "can only be resolved by an evidentiary hearing in open court where credibility and demeanor can be assessed by the trier of the fact." (*Id.* at 2. See similar statements to that effect on pages 8 and 18).

The parties, however, in the agreed order of May 31, 1984, stated the following in regard to the issues presented by AMPI's motion for sanctions against NFO:

> 3. *SANCTIONS—AMPI's Motion Against NFO*—The record on this issue is closed, it has been fully briefed and argued. The counterclaim defendant AMPI has sought adverse inferences and an as yet unquantified amount of attorney's fees and expenses as sanctions in conjunction with its motion. If the Court rules the motion in AMPI's favor, counterclaim defendant AMPI shall be permitted to submit, within a reasonable period of time, a cost petition setting forth the precise fees and costs it claims.

Exhibit D attached to AMPI's memorandum and suggestions is a copy of AMPI's April 27, 1976 response to a reply brief filed by NFO in regard to one of AMPI's motions for an order declaring NFO in contempt. On page 3 of that April 27, 1976 response AMPI candidly stated that "it is fair to say that if there had been no NFO Rule 37 motion AMPI might have been more willing to follow Mid-Am counsel's course when it learned of the 'clean-out' from them for the first time in early 1974, and might not have followed this matter up with as much vigor." AMPI added, we think quite properly, that: "Nevertheless AMPI's motion should be judged on its substance and merits."

[4] As noted above, paragraph 3 of the agreed order of May 31, 1984 advised the Court that the parties consider that the record on the issue presented by AMPI's motion for sanctions against NFO is "closed." On the basis of the present record, however, we are satisfied that although AMPI certainly made an appropriate showing of untimely, and in some narrow instances, a total failure of document production on the part of NFO, discretion should not be exercised in favor of AMPI to the extent that we enter an order that NFO's market penetration claims should be dismissed.

We recognize, of course, that the Court of Appeals took an extremely dim view of what it described as AMPI's "egregious" and "outrageous" conduct in connection with its treatment of what it called "the suppression and destruction of evidence by AMPI." *Alexander v. NFO, supra,* 687 F.2d at 1205. We must also recognize that the Court of Appeals, unlike this Court, apparently was not in the least concerned with whether, after all was said and done, NFO suffered any real prejudice as a result of the delay, for example, of the production of the San Antonio grand jury documents.

We cannot, however, believe that the Court of Appeals intended to lay down any general rule that the most severe sanction of dismissal or default should routinely be imposed, regardless of the nature of the documents involved and regardless of their relevance or materiality to a particular case. While the Court of Appeals apparently was not concerned about the relevancy of all the documents involved in NFO's Rule 37 motion, we cannot ignore the fact that we know enough about the documents involved in AMPI's motion for sanctions to conclude that in our judgment, subject to what the Court of Appeals may later have to say, AMPI should be entitled to its costs and attorneys fees for deposing the witnesses listed on page 6, footnote 5, of AMPI's memorandum and suggestions filed in this Court after remand.

Those costs and attorney's fees, of course, would be limited to the depositions taken, or the parts of other depositions taken, solely on the issue of NFO's alleged concealment and destruction of documents.

Accordingly, it is

ORDERED that AMPI shall, within a reasonable period of time to be established by the Court on recommendation of the parties, prepare, serve and file a cost petition setting forth the precise fees and costs it claims in accordance with what we have above stated.

ISSUE NO. 4—PRECLUSION OF NFO'S EXPERT WITNESS

ISSUE NO. 5—CAUSATION

ISSUE NO. 6—DAMAGES MEASUREMENT

I.

All three of the issues stated in the above heading are directly related and will be so treated. In the course of our discussion we shall set forth the basic arguments made in the various briefs filed by the parties in sufficient detail so that it will be understood that we have given those arguments appropriate consideration in making our determination of the questions presented in regard to all three issues.

II.

NFO's Motion for Damages

The Court of Appeals in *Alexander v. National Farmers Organization, supra,* 687 F.2d at 1210, remanded this case with directions that this Court, "in its discretion, conduct such further proceedings and make such new findings as may be appropriate to ensure that the determination of damages and other relief can be made consistent with this opinion." Following that remand, NFO and the NFO class claimants filed a motion for an order of this Court that would award them damages against AMPI, Mid-Am and CMPC as follows: (1) NFO market-penetration damages in the amount of $12,947,034, trebled to $38,841,102, and (2) NFO claimant price-reduction damages in the amount of $1,075,383, trebled to $3,226,149.

Although afforded the opportunity to do so, NFO elected not to adduce any new or additional evidence. Plaintiffs expressly stated on page 1 of their brief in support of their motion for damages that "plaintiffs have not introduced any

new damage evidence nor new damage theories, but instead rely upon the evidence adduced and the theories originally advanced at trial."[2]

Compliance with the Court of Appeals' directions on remand has been an extremely difficult task for the reason that the parties radically disagree in regard to how the opinion of the Court of Appeals should be read. NFO stated that its brief in support of its motion was "submitted to aid the Court in quantifying the recoverable damages by indicating the impact of the Eighth Circuit's decision . . . and by providing a 'road map' (Appendix A attached hereto) which outlines and condenses the damage proofs already presented." (NFO's Brief in Support of Mot. for Damages at 1).

Describing the Eighth Circuit's opinion in 687 F.2d 1173, NFO stated that "[t]he Eighth Circuit held that assessment of damages may be based on inferences drawn 'from the circumstances and evidence as a whole.' *Id.* at 1210." NFO then stated that "the evidence shows, and the Eighth Circuit found, that the defendants were the 'major marketers of milk produced in the Midwest,' *id.* at 1192, and that, among other findings, 'NFO's marketing efforts became a serious problem for Mid-Am, AMPI and CMPC.' *Id.* at 1194;" that " 'NFO and AMPI were in full scale competi-

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[2]Although no order had been entered designating a NFO dairy farmer class as parties plaintiff, the brief filed in support of the motion for an order awarding damages described the "plaintiffs" in this case as "NFO and the NFO farmer class claimants."

NFO, of course, claims for itself all the damages it claimed at trial except the "price-reduction" damages which it concedes the Court of Appeals held it was not entitled to recover. Recovery, however, is still sought for the "price-reduction" damages by seeking to have a class of NFO dairy farmers certified at this time. Our references to the arguments made by NFO should be read to include arguments made on behalf of both NFO and the alleged NFO dairy farmer class.

tion,' *id.* at 1189, and 'Mid-Am viewed NFO as a substantial threat.' *Id.*"; and that "[t]hese 'major marketers' engaged in a 'broad pattern,' *id.* at 1200, of concerted predation throughout a 'ten state region,' *id.* at 1193, specifically intended to 'eliminate NFO as a competitor.' *Id.*" (NFO's Brief in Support at 1).

NFO further stated that "[t]he Eighth Circuit found that 'the act of injury is unmistakable on this record' and specifically instructed this Court that it has 'broad latitude in assessing the amount of damages which NFO *shall* recover.' *Id.* at 1210 (emphasis added [by NFO])" and that "[i]n light of this instruction, and in view of the 'circumstances and evidence as a whole,' only one inference can be drawn: NFO, virtually from the beginning in 'full scale competition' with the defendant 'major marketers,' had the potential to achieve a substantial share of the ten state milk market." *Id.* at 2.

Based on that reading of the Court of Appeals' opinion, NFO argued that "[t]he only substantive antitrust issue that remains in this proceeding under Section 4 of the Clayton Act is the quantification of damages suffered by the plaintiffs" and that "[u]nder the Eighth Circuit's decision, NFO is entitled to the marketing fees and membership dues it would have received had there been no antitrust violation." *Id.* at 2-3.

In support of its claim for damages NFO relies on the same market structure theory and the same test market theory which it presented at trial through the testimony of Dr. Robert A. Nathan (Nathan). The first theory, according to NFO, would be established by paragraphs 2268-74 and paragraphs 2331-58 of NFO's proposed findings of fact and by pages 9635-54 of Nathan's direct examination. NFO states that its second theory would be established by paragraphs 2261-67 and paragraphs 2275-2330 of NFO's pro-

posed findings of fact and pages 9585-93 of Nathan's direct testimony.[3]

NFO states that the price-reduction damages now claimed on behalf of "the NFO class claimants," is supported by an analysis prepared by NFO counsel, and is based on paragraphs 2018-62 of the findings of fact proposed by NFO at trial. NFO argues that the Court of Appeals recognizes "that these price reduction damages belonged to the individual NFO dairy farmers." NFO cites and relies upon the familiar antitrust cases of *Zenith v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-34, 89 S.Ct. 1562, 1576-82, 23 L.Ed.2d 129 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561-66, 51 S.Ct. 248, 250-52, 75 L.Ed. 544 (1931); and *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 377-79, 47 S.Ct. 400, 404-05, 71 L.Ed. 684 (1927), and the progeny of those cases. NFO, however, has directed attention to a relatively small number of its proposed findings of fact or to the portions of the record which they contend would support those proposed findings of fact.

Rather, NFO quoted the latter portion of a sentence of the Court of Appeals' opinion which stated that: "It was error, however, [for the district court] not to draw factual inferences adverse to AMPI on matters undertaken in or through offices and individuals involved in the destruction of documents." NFO therefore argued that "NFO is at least entitled to the very strongest adverse inferences that can be

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[3]NFO, of course, also argues that its two theories of damages are supported by NFO Exhibits 826; 896; 860; 1001 to 1014, inclusive; 1014a; 1015 to 1041, inclusive; 1220 to 1225, inclusive; 1622; and 1666, all of which were included in Appendix E attached to plaintiffs' brief in support of its motion for an order awarding damages.

drawn from the wholesale destruction" of the Little Rock documents and that "[a] reasonable adverse inference is that the destroyed evidence would have reinforced the admission that when the defendants honestly analyzed NFO's potential, they too concluded that NFO was capable of becoming a major milk pooling firm, and would do so unless they conspired to force it out of the market." (NFO's Brief in Supp. of Mot. for Damages at 16-17.)

III.

Defendants filed two separate briefs in opposition to NFO's motion for damages, one brief directed to the question of "causation"; the other brief directed to the question of "measurement of damages."

IV.

Defendants' Causation Brief

Defendants' causation brief, as did NFO's brief in support of its motion for damages, focused on particular portions of the Court of Appeals' opinion to support its reading of that opinion. Defendants make reference to a substantial number of statements in the Court of Appeals' opinion to support their argument that a " 'threshold factual issue [of] causation' [687 F.2d at 1208] is very much alive." (Brief in Opposition: Causation at 2.) For example, defendants noted that the Court of Appeals, after holding that NFO was not entitled to recover any alleged "price-reduction" damages stated that "[l]osses of such dues and fees, *to the extent attributable* to the defendants' unlawful conduct, represent direct injury to NFO in its 'business or property.' *Id.* at 1209 (emphasis added by defendants)" and that the Court of Appeals added in a footnote that "[u]nder these circumstances, lost membership dues are not indirect injuries and NFO is entitled to recover such dues *to the extent such losses are reasonably shown to be caused by the antitrust conspir-*

acy. Id. at 1209 n. 42 (emphasis added by defendants)." (Brief in Opp: Causation at 2-3). Defendants argue that the Court of Appeals "defined the standard" to be applied on remand "for the third time" when it stated that ". . . NFO has a right to recover the fees and dues that *it reasonably shows it would have derived in such markets but for the effect of the unlawful conduct. Id.* at 1210 (emphasis added and footnote omitted by defendants)." (Brief in Opp. at 3).

Defendants contend that the Court of Appeals "provided guideposts for application of the standard" which defendants contend is applicable on remand in connection with its discussion of specific overt acts which the Court of Appeals found to be in violation of the antitrust laws. *Id.* at 3. Defendants point to the Court of Appeals discussion of Gandy Dairy, located in San Angelo, Texas, (in connection with which NFO presently claims no damages) and to the footnote appended to the discussion of that dairy's refusal to purchase NFO milk which stated that " '[o]f course, in assessing damages, the district court may consider *the extent to which NFO's harm is attributable to AMPI's conduct.*' 687 F.2d at 1196 n. 21 (emphasis added by defendants)." (Brief in Opp. at 4). Defendants also directed attention to another footnote to the Court of Appeals' discussion of defendants' litigation and threats of litigation against actual or potential customers of NFO which stated that "[i]mplicit in the [district court's] findings may be determinations as to the *extent to which NFO was harmed* by this aspect of defendants' conduct. *Such questions can be fully considered on remand. Id.* at 1203 n. 35 (emphasis added by defendants)." (Brief in Opp. at 4).

Defendants further contend that the Court of Appeals made clear that it anticipated that factual questions might be presented on remand in connection with certain of the defendants' mergers and acquisitions. Defendants note that after the Court of Appeals concluded that it could not say that "it was clearly erroneous for the district court to reject findings that the acquisitions, mergers and related milk

pooling practices were part of an unlawful conspiracy," (*Alexander v. NFO, supra,* 687 F.2d at 1206) it went on to say that:

> In instances where acquisitions of independent dairies resulted in actual displacement of preexisting NFO sales, however, the district court, on remand, should consider whether such conduct following acquisition reflects an intent to block NFO *rather than a legitimate business decision based upon price, quality or similar factors.* Where post-acquisition terminations of NFO sales are found to be part of a scheme to eliminate NFO, such lost sales would form a basis for NFO's damage claim. *Id.* at 1206-07 (emphasis added by defendants)." (Brief in Opp. at 4-5)

Defendants concede that the Court of Appeals' determination that NFO could not recover "price reduction *damages*" did not completely remove the "price reduction *issue*" from factual consideration on remand. Defendants directed attention to the fact that after the Court of Appeals determined that "NFO's net revenues were . . . tied to the volume of its marketing, not to the *price* it earned," the Court of Appeals stated that "[t]he price reduction issue *may* be relevant to NFO's damages in that, by virtue of selling at lower prices, NFO *may* have lost members or, in turn, marketing volume. The measure of such harm, however, would be the lost fees and dues *from those who stopped marketing through NFO,* not the price differential. 687 F.2d at 1208-09 (emphasis added by defendants)." (Brief in Opp. at 7).

Defendants contend that under the directions provided by the Court of Appeals as above quoted, NFO must not only prove it lost sales to handlers such as Beatrice, Gandy, Wanger and Foremost, but that it has the burden of proving that NFO thereby lost "member milk marketings and members" of NFO. (Brief in Opp. at 7). Defendants contend that such "particularized proof" is mandated by the Court of Appeals' conclusion that:

> Here, there is no doubt that the unlawful conspiracy was the material cause, for example, of Beatrice's cutoff decision in March of 1971 and of Foremost's subsequent rejection of the same shipments. [citations omitted]. *The extent to which rejections of NFO milk by these dairies in other periods (or by other dairies in the face of similar conduct) were also due to defendants' conspiracy is a factual question for the district court. Id.* at 1210 (emphasis added by defendants).

(Brief in Opp. at 7-8).

Defendants further pointed to what it described as "the appellate court's repeated admonitions concerning the effect of NFO's mismanagement and bungling upon the 'harm' sustained by NFO, Inc." (Brief in Opp. at 11). Defendants noted that the Court of Appeals quoted with apparent approval this Court's observation, *In re Midwest Milk Monopolization Litigation,* 510 F.Supp. 381, at 420 (1981), which stated that "the record would come closer to supporting a set of findings that NFO became a victim of its own propaganda and that its ignorance and inexperience in the dairy field required it to experiment with one unsound idea after another. . . . *Id.* at 1188." (Brief in Opp. at 11). Defendants' causation brief also directed attention to that portion of the Court of Appeals' opinion which stated that:

> The defendants also attack NFO's right to recover membership dues and checkoff fees on the ground such *damages are speculative, present impossible tracing problems, and ultimately reflect self-inflicted harm rather than damage causally linked to defendants' unlawful conduct. These arguments largely raise factual questions for the district court,* but the fundamental legal guidelines are clear. 687 F.2d at 1209 (emphasis added by defendants).

(Brief in Opp. at 11-12).

And finally, in the same regard, defendants quote the following passage of the Court of Appeals:

> *We also recognize that NFO's entry into the business of milk marketing was not conceived or managed as effec-*

> *tively as the efforts of the co-ops and that NFO cannot recover for losses clearly attributable to its own failures.* On the other hand, NFO correctly argues that "defendants are really trying to clip NFO's wings and then escape liability on the grounds that NFO 'cannot fly.' " [citations omitted] We note only that *the district court must weigh these factors,* mindful that the legal standard permits recovery where defendant's unlawful conduct is "a material cause of injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury." [citation omitted] 687 F.2d at 1210 (emphasis added by defendants).

(Brief in Opp. at 12).

Defendants state that the voluminous findings of fact proposed in Appendix A attached to defendants' causation brief to NFO's motion to award damage "clearly establishes" that:

- NFO's "dragnet" damage theory, indiscriminately attributing *all* of NFO's alleged losses to defendants' conduct, fails to account for the effects on NFO of *lawful* competition by defendants *and* third parties. It is therefore fatally defective as a matter of law.
- NFO's milk quality problems were monumental, unprecedented and caused NFO to be unattractive to customers and members.
- NFO's reputation as a militant, radical organization and its misguided policies and gross mismanagement caused losses of customers and members alike.
- NFO's experimentation with one unsound marketing "gimmick" after another and incessant appeals ("crisis drives") for money alienated dairy farmers.
- NFO's internal record-keeping, particularly its financial records, were in such disarray that reasoned management decision-making was impossible; NFO could not even determine whether the dairy program was losing money.
- NFO's sales "efforts" were feeble indeed. NFO failed to even contact a number of potential customers in

the "damage" area. Even when NFO representatives made pro forma "get-acquainted" calls and received indications of handler interest, NFO did not follow up.

- NFO's mismanagement was not confined to the Midwest but permeated NFO's dairy program throughout the country. Indeed, NFO's performance was *better* in the area allegedly subject to conspiratorial conduct than it was in the "non-conspiracy" areas.
- NFO's ineffectiveness was not confined to its dairy program. NFO's blunders in other commodities, such as the cull cow program, and millions of dollars of losses in its grain program caused widespread membership defection.
- NFO repeatedly imposed one mandatory deduction after another on dairy farmers marketing through NFO until its dairy deductions became the highest in the industry. This tactic alienated existing as well as potential members.
- NFO's asserted "loyal" membership base was illusory. NFO's own records indicate that scores of those "die-hard" members hadn't paid their dues for years. Indeed, NFO carried on its books millions of dollars of unpaid dues, a significant portion of which had been delinquent for over 10 years.

(Brief in Opp. at 13-14).

In addition, defendants contend that NFO has ignored the fact that this Court has rejected any number of findings of fact which NFO proposed at the time of trial and the fact that the Court of Appeals did not disturb those rejected findings on appeal.[4] The defendants, for example, state that

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[4]In footnote 28 on page 442 of 510 F.Supp. we stated the following in regard to what we meant by the use of "[Rejected]" when used in regard to a particular finding of fact as proposed by NFO: "The use of '[Rejected]' in regard to paragraph 97 above and in regard to many, many of the paragraphs of findings of fact proposed by NFO reflect an explicit finding and conclusion that NFO failed to prove the particular finding of fact proposed and

"this Court has already rejected NFO's proposed findings of its alleged capability in dairy marketing and its alleged ability to draw dairy farmers" and direct attention to this Court's treatment of those particular paragraphs in 510 F.Supp. at 454, which shows rejection of paragraphs 346-47, 349-50, 352, and 354 of NFO proposed findings of fact. (Brief in Opp. at 20). We shall illustrate the thrust of defendants' argument in the next section of this memorandum opinion.

V.

To understand the present significance of this Court's rejection of particular findings of fact proposed by NFO at trial, we set forth all of the paragraphs which NFO proposed that we should have found in regard to "NFO's Recruiting Efforts". NFO proposed findings of fact in that regard were stated in paragraphs 345 to 354 in its trial proposed findings of fact.[5]

> 345. Once NFO decided in 1958 to alter its purpose and start bargaining instead of protesting, NFO began soliciting dairy, meat and grain farmers to sign the NFO membership agreement.
>
> 346. [Rejected] Dairy farmers were as interested in joining NFO as were meat and grain farmers.
>
> 347. [Rejected] NFO solicited new members at meetings by focusing on the primary commodities that they produced.
>
> 348. From 1958 to 1965, NFO's primary activity was soliciting farmers to join NFO.

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that the weight of all the evidence adduced in the case is likewise insufficient to support the particular finding proposed by NFO."

[5]We have added the word "[Rejected]" immediately after the particular paragraph number of NFO's proposed findings of fact so that it can be understood what this Court refused to find as a matter of fact at trial.

349. [Rejected] The percentage of all NFO members in an area who are dairy farmers generally corresponds to the percentage of all farmers in that area who are dairy farmers.

350. [Rejected] Most of the farmers that NFO enrolled as members in Minnesota and Wisconsin were dairy farmers.

351. NFO is the only farm organization in the United States that markets milk, meat and grain.

352. [Rejected] NFO's multi-commodity program was attractive to farmers.

353. NFO emphasized its cull-cow program when it attempted to enlist dairy farmers to market milk through NFO.

354. [Rejected] Generally, farmers received more money for cows marketed through the NFO cull-cow program than they did for those sold through local auctions.

Examination of our treatment of those ten proposed findings of fact on 510 F.Supp. at 454 shows that we adopted only paragraphs 348 and 351 as proposed. Paragraphs 345 and 353, were modified in accordance with our view of the weight of the credible evidence.

In considering the significance of this Court's determination at trial that NFO had not adduced sufficient credible evidence to support NFO's proposed findings of fact as contained in paragraphs 346, 347, 349, 350, 352, and 354, as above quoted, it must be understood that paragraph 2215 of NFO's proposed damage finding of fact, (which would reflect an acceptance of the data reflected in NFO Exhibit No. 1023) is based on the assumption that NFO was, in fact, entitled to all five findings of fact proposed in paragraphs 345-50 of its proposed findings of fact.[6]

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[6]NFO cited the following data to support paragraph 2215 of its proposed finding of fact "(Nathan, Tr. at 9603-08; NFO Exh. 1023; F. 345-50, 2213-14)." The five pages of Dr. Nathan's testimony

The thrust of defendants' argument in regard to the impact of this Court's rejection of NFO's proposed findings of fact is thus made clear when it is understood that this Court expressly rejected paragraph 349 of NFO's proposed findings of fact which stated: "349. The percentage of all NFO members in an area who are dairy farmers generally corresponds to the percentage of all farmers in that area who are dairy farmers." NFO contended at trial that its proposed finding of fact in paragraph 349 was supported by the following cited testimony: "Staley, Tr. at 1651-59; Berkhahn, Tr. at 6468-70; Scott, Tr. at 2541-43, 3076." Although a small number of the pages of the testimony of Staley, Berkhahn or Scott were included in Appendix G which NFO filed in support of its motion for damages, the particular pages cited in support of paragraph 349 were not reproduced for inclusion in that appendix. Examination of the conclusory testimony of each of those three witnesses in the complete transcript of their testimony establishes the reasons why this Court concluded that NFO had not adduced sufficient credible evidence to support the finding of fact as proposed in paragraph 349.

In regard to Staley's testimony, for example, the pages cited by NFO to support paragraph 349, Tr. at 1651-1659, show that Staley was permitted to testify in response to leading questions, subject, however, to the defendants' objections, that NFO's recruiting efforts established that "the breakdown of farmers who joined NFO on the basis of commodity produced was the same as for all farmers in that state" (Tr. 1655-56).

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cited by NFO did no more than describe the manner in which NFO Exh. Nos. 1022 and 1023 were prepared. Exh. No. 1023 simply sets out the same data included in paragraph 2215 in more detailed form. The proposed findings in paragraphs 2213-14 do the same thing in regard to NFO Exh. 1022.

On page 1860 of the transcript the Court noted that Staley's testimony on direct examination in regard to NFO membership had been given "in very, very conclusory language, based upon no factual data that I know anything about" and that "I am at a complete loss of knowing what actual membership, so far as milk participation is concerned, that NFO has any place in the United States up to this point."

Berkhahn testified on direct examination that NFO membership "tended to parallel very closely the type of agricultural production that was produced in that area" (Tr. 6468) and that he thought he could "estimate how many dairy producers you had who were interested in marketing through NFO" (Tr. 6470). When cross-examined about the testimony he had given on direct examination he conceded that neither he nor any one he knew had any idea about how many dairy farmers in the United States were members of NFO.

Berkhahn was being specifically examined about his testimony given on page 6470 of his direct examination, see Tr. 6687, when he gave the following testimony on cross-examination at Tr. 6689:

Q (By Mr. Park) Mr. Berkhahn, in the year 1970, how many dairy farmers in the United States were members of the NFO?

A I don't know.

Q Do you know who knows?

A No, I don't.

Q Do you know whether that figure is ascertainable from within NFO's records?

A No, I do not.

Q If I were to ask you the same question for every year for 1971, 1972, and 1973, and 1974, would your answer be the same?

A Yes, it would.

Q Are you aware of any system or procedure within the NFO today from which one could ascertain how many of the total NFO membership are dairy farmers?

A No, I am not aware of any.

Scott testified on direct examination on the pages cited by NFO to support the proposed finding stated in paragraph 349 that "if the dairy farmers in the area, the majority of them were dairy farmers, then we tended to have a majority of our members as dairy farmers" (Tr. 2541); that "in that area [Southwest Missouri] there were a lot of dairy farmers and we had a high percentage of the dairy farmers in that area as members of NFO" (Tr. 2542); and that "the membership tended to break down the same way wherever [he had] worked for NFO" (Tr. 2543).

Defendants' cross-examination of Scott, however, established that his conclusion that "about fifty percent of the producers in Southwest Missouri were members of the National Farmers Organization" was based on what "someone had told" him and that he had only been told that those producers "had signed at some time and paid their dues at some time" (Tr. 3074). Tr. 3077 of Scott's cross-examination shows that he confirmed the testimony he had given at a damage deposition in October 1975 that he knew of no way that he could determine the number of NFO members who were dairy farmers by checking any NFO record.

Scott further testified, Tr. 3081, that the following testimony given at his October 1975 damage deposition was true and correct at the time of trial:

"Q As a matter of fact, from what you know in the way of NFO records, it will be impossible to do it, wouldn't it, as far as you know?

"A As far as I know, yes.

"Q Now, how about the State of Oklahoma, do you have any opinion as to the total number of dairy

farmers who are members of NFO in the State of Oklahoma?

"A No, sir.

* * * * *

"Q Again, based on your knowledge, would it be impossible from NFO records to determine the number of dairy farmers in the State of Oklahoma or who were members of NFO at any point in time?

"A To get a complete list, yes.

"Q The same question with regard to the State of Kansas, do you have any judgment or opinion as to the total number of dairy farmers who are members of NFO who are physically located in the State of Kansas?

"A The same answer, I would not be able to say."

* * * * *

"Q Do you know the number of members in the State of Missouri?

"A No, not—I couldn't give you the specific number of members."

Scott further testified that:

"Q And you have never known the number of NFO members for any period of time, is that right?

"A That is correct.

"Q So that if I were to ask you, Mr. Scott, sitting here today to make some kind of a comparison between, say, NFO's membership as of December 31, 1974 and December 31st of any other year, you would just be wholly incapable of doing that, isn't that right?

"A That is correct.

"Q Because the basic data, the underlying percentage, just doesn't exist on which you can form an opinion, is that right?

"A That is right."

The problem created by NFO's election to stand on the findings of facts it proposed at trial and its attempted reliance upon proposed findings of fact which have been expressly rejected by this Court is not confined to paragraph 349 which we used as an example and which we have discussed in detail. For it is clear, again by way of example, that NFO's proposed findings of fact in paragraphs 2298 to 2312 in regard to "NFO's minimum performance, absent restraints" is based on the assumption that all of the findings of fact proposed by NFO in paragraphs 128-340 and paragraphs 469-2017 were, in fact, supported by the greater weight of the credible evidence. A glance at NFO's "[Rejected]" proposed findings of fact in 510 F.Supp. at 443 to 454 and 458 to 501 in regard to those particular paragraphs will show the large number of proposed findings of fact which this Court concluded were not supported by the greater weight of the credible evidence.

VI.

Defendants' Measurement Brief

Defendants' measurement brief filed in opposition to NFO's motion for an order to award damages was solely directed toward the propriety of NFO's measures of damages for alleged lost membership dues and checkoff fees.

Defendants argued that "NFO's damage evidence is even more speculative and inadmissible on this remand than it was at the trial, inasmuch as NFO has failed to prevail on most of the acts of alleged illegality which it asserted at the trial as the predicate for its damage theories and computations." (Brief in Opp.: Measurement of Damages at 5.)[7]

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[7]Defendants accurately state that paragraphs 128-349 and 469-2017 of NFO's proposed findings of fact set forth the factual contentions that NFO sought to establish at trial and that such

Defendants contend that the "Eighth Circuit affirmed this Court's findings of the legality of many of the acts and practices challenged by NFO on appeal, including charges relating to mergers and acquisitions of independent cooperatives (687 F.2d at 1206); pool loading (*Id.*); standby pools (ARSPC) (*Id.* at 1206-07); alleged bad faith litigation (*Id.* at 1200); attempts to block NFO's USDA qualification (*Id.* at 1199); and the alleged conspiracy with AMDI (*Id.* at 1199). (Measurement Brief at 5-6)."[8]

Defendants further argue that the "only unlawful conduct found by the Court of Appeals—all occurring in 1970-71—related to certain specific handlers, Gandy Dairy, Wanzer Dairy, Beatrice-Fort Worth, and Foremost-Dallas, threats of suits against handlers that could be shown to have resulted in the rejection of NFO milk, and the acquisition of independent proprietary dairies insofar as they were designed to, and did, foreclose NFO milk. (687 F.2d at 1196-1204, 1206-07)" and that "the appellate court specifically directed this Court on the remand to weigh and

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proposed findings of fact "provided the express predicate for Mr. Nathan's assumption from NFO counsel of defendants' alleged illegal conduct in performance of Nathan's commission from NFO counsel to 'measure' NFO's purported damages for lost dues and checkoffs from such assumed wrongful conduct." (Brief in Opp.: Measurement of Damages at 5).

[8]Defendants further stated that this Court's findings of fact in regard to NFO's charges relating to "defendants' full supply contacts, base plans, CMPC retroactive credits and alleged predatory conduct directed by defendants, or one or more of them, against specific handlers, such as Midwest Creamery, Gilt Edge, Hiland Dairy, Turner Dairy, Foremost-Springfield, Steffen Dairy, Hyde Park Dairy, Ewald Dairy, Page Milk Co., Marigold Foods, Carnation, Schepps Dairy, Hawthorne-Mellody and Fairmont Foods" were not disturbed by the Court of Appeals' decision on appeal. (Measurement Brief at 6).

consider the extent to which NFO was injured and 'harmed' thereby." (Measurement Brief at 6-7).

Defendants argued that Dr. Nathan's opinions are not credible because those opinions were based on unsupported assumptions given him by NFO and because he lacked the expertise required by Rules 702 and 703 of the Federal Rules of Evidence. Defendants contend that "Rule 702 imposes two threshold requirements for the admissibility of expert testimony: (1) the testimony must be helpful to the trier of fact to understand the evidence or to determine a fact in issue, and (2) the expert must be qualified to express opinions that are relevant to the inquiry." (Measurement Brief at 13). Defendants further argued that Rule 703 must be given appropriate consideration for the reason that the "purpose of Rule 703 is to make certain that the expert's opinion has sufficient basis without reference to unsupported assumptions and theoretical speculation." (Measurement Brief at 15).

On the facts, defendants argued in their measurement brief that "[a]t the trial, Nathan admitted that he was not, and did not purport to be, an expert in the dairy marketing industry. (Nathan, Tr. 10314, 10317, 10712-22, 10740, 10760-61, 11135; DF.1)." (Measurement Brief at 18). Defendants contend, on the facts, that Nathan disclaimed having any expertise in the dairy industry or in raw milk marketing and that he relied almost entirely upon assumptions provided by NFO counsel without investigation or knowledge of that validity of the assumptions which had been given him by counsel.

The questions of whether Nathan could properly assume that NFO had the capabilities to be what Nathan described as a "major" marketer of raw milk and whether NFO could have penetrated each of the ten "damage" orders but for the assumed wrongful conduct of the defendants were in sharp factual dispute. Defendants' measurement brief pointed out that on direct examination, Nathan testified that he con-

sidered that the most important factor to take into account in regard to NFO's capability had to do with NFO's membership base (Tr. 9593-94) and that he had also testified on direct examination that NFO could be considered as a prospective major pooling firm because of "NFO's experience in organization, its general status as a major farming organization in the middlewest, given its membership throughout that area, in varying degrees, [and] given its experience—some experience in milk marketing prior to this major thrust in 1969-1970" (Tr. 9638).

In regard to NFO's prior experience in milk marketing, in defendants' measurement brief, defendants directed attention to testimony given by Nathan as he had testified as follows on cross-examination:

> Q. (By Mr. Peterson) What did NFO counsel tell you, if anything, about NFO's prior experience in milk marketing?
>
> A. They told me no details as to how extensive it was nor how long. They told me to assume that NFO had had experience in milk marketing.
>
> Q. Well, did they tell you to assume whether those experiences were successful or unsuccessful?
>
> A. No, sir, they did not.
>
> * * * * *
>
> Q. Well, do you know anything about the nature of those experiences?
>
> A. I do not.
>
> Q. So when NFO in 1970 decided to engage in direct milk marketing, a direct marketing program, you don't know whether NFO had a successful or unsuccessful past history as far as milk marketing efforts are concerned?
>
> A. That is correct. (Nathan, Tr. 10601-02).

(Measurement Brief at 27-28).

For a further example of Nathan's cross-examination in regard to the manner in which he had accepted the assumption of NFO's capability, defendants' measurement brief noted that Nathan had testified as follows:

> Q. You are assuming that NFO had the full capacity to be a major marketer and there were no restrictions or limitations on their obtaining that capability?
>
> A. I did not go into the limitations, nor did I assume whether these limitations were balanced equally or more than balanced or more than offset by advantages.
>
> Q. You didn't even consider whether there were limitations, did you?
>
> A. That is correct.
>
> Q. If there were limitations, wouldn't that cause some readjustment in your theory?
>
> A. Depends on what the advantages are, the pluses that would balance off with the minuses.
>
> Q. But that is nothing that you can tell us about here today?
>
> A. That is correct, sir. (Nathan, Tr. 10182-83).

(Measurement Brief at 29).

Defendants noted that Nathan conceded on cross-examination that he had no "personal knowledge of the capabilities of NFO's management" and that consideration of that factor was "purely an assumption" (Tr. 10593). Nathan testified as follows:

> Q. And who does that assumption [of the capabilities of NFO's management] come from, or what is it based upon, if anything?
>
> A. As I recall, this was an assumption given to me by NFO counsel.
>
> Q. Would this assumption include an adequate staff,

integrity of management, a good level of payroll and experience, as far as capability is concerned?

A. *I don't know really what the counsel has in mind. I was told to assume that NFO had managerial capabilities and resources to achieve—to become a significant factor. I don't recall any discussion about the components.*

Q. *You didn't discuss the components, they told you to assume that NFO has whatever capability is necessary to penetrate these markets, am I stating it fairly?*

A. *Yes, I think that is correct.* (Nathan, Tr. 10593; emphasis added by defendants).

(Measurement Brief at 30).

Defendants contended in their measurement brief that Nathan's lack of experience in regard to the milk marketing industry causes him to focus on inappropriate factors in his attempt to project NFO's assumed capability and expected performance and thus argued that his testimony should not be accepted.

Defendants relied upon and urge that this Court accept the testimony of Dr. Emerson Babb, a member of the Department of Agricultural Economics at Purdue University since 1960, called by defendants, who they state was "well qualified to testify as an economic expert in dairy marketing and to assist the Court as the trier of fact on these matters." (Measurement Brief at 31). Defendants argued that "Dr. Babb articulated most fully and convincingly the errors contained in Nathan's basic assumption that NFO possessed the capability to become a major factor in the business of marketing raw milk." (Meas. Brief at 32).

Defendants further contended in their measurement brief that Dr. Babb demonstrated that "Nathan's reliance in his direct testimony in making his projections of NFO's expected penetration of the 10 Midwest federal milk orders upon assumptions of NFO's estimated membership among

Midwest dairy farmers, its milk marketing experience prior to 1970, its focus upon the Midwest area in milk marketing and its experience in other agricultural commodities, was totally misplaced." *Id.* at 32-33.

Defendants, of course, contend that the disputed issues of fact created by the testimony of Dr. Nathan and Dr. Babb should be resolved in favor of the defendants.

VII.

Defendants further argued in its measurement brief that NFO, by its election to rely solely on the proposed findings of fact presented at trial, attempts on remand to recover damages which were occasioned by acts of lawful, rather than unlawful competition. Defendants rely on cases such as *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*,——U.S.——, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983). Defendants argued that the Court of Appeals directed this Court on remand to consider and weigh the extent to which NFO's "harm" was attributable to the specific conduct found by it to be illegal, including the circumstances that might be said to be established in regard to Gandy Dairy (687 F.2d at 1196 n. 21), Wanzer Dairy (*id.* at 1199 n. 29), threats of suits against handlers which resulted in rejections of NFO milk (*id.* at 1203 n. 35), Beatrice-Fort Worth and Foremost Dairy-Dallas rejection of NFO milk (*id.* at 1210) and how the acquisitions of independent proprietary dairies may have been part of a scheme to eliminate NFO (*id.* at 1207).

Defendants' measurement brief directed particular attention to various findings of fact and conclusions of law which the Court of Appeals affirmed. In that regard, defendants stated that the Court of Appeals "upheld this Court's findings and conclusions that NFO did not prove the offenses of attempt to monopolize and monopolization. (*Id.* at 1191) [and] . . . affirmed this Court's dismissal of NFO's claims against ARSPC. (*Id.*)" (Meas. Brief at 47). Defen-

dants added that the Court of Appeals also affirmed this Court's findings "relating to the legality of (1) mergers and acquisitions of independent cooperatives (687 F.2d at 1206); (2) pool loading (*Id.*); (3) standby pools (ARSPC) (*Id.* at 1206-07); (4) alleged bad faith litigation (*Id.* at 1200); (5) attempts to block NFO's qualification by the USDA (*Id.* at 1195); and (6) the alleged conspiracy with AMDI (*Id.* at 1199)." (Meas. Brief at 47).

Defendants thus argued that NFO failed to prevail in regard to particular alleged unlawful acts and conduct for the reason the Court of Appeals left undisturbed this Court's findings of fact and conclusions of law in regard to the claims made by NFO in regard to "conduct related to (1) full supply contracts (NFO Proposed Fdgs. 592-596, 828, 907-08, 1102, 1661, 1678, 1680, 1688, 1725, 1751, 1775, 1777, 1823, 1835, rejected by this Court, 510 F.Supp. at 462, 469-70, 475, 492-94, 497); (2) base plans (NFO Proposed Fdgs. 591, 791-793, 1952, rejected by this Court, 510 F.Supp. at 460, 467, 499); (3) CMPC retroactive competitive credits (NFO Proposed Fdgs. 1472-73, rejected by this Court, 510 F.Supp. at 486-87; and (4) alleged predatory acts against fourteen specific handlers."[9] (Footnotes omitted). (Meas.

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[9]The fourteen handlers were identified in a footnote as follows: "These handlers are: (1) Midwest Creamery-Oklahoma (NFO Proposed Fdg. 663, rejected, 510 F.Supp. at 464); (2) Gilt Edge (NFO Proposed Fdg. 708, rejected, 510 F.Supp. at 465); (3) Hiland Dairy-Springfield (NFO Proposed Fdgs. 886, 895-97, 903, rejected, 510 F.Supp. at 470); (4) Turner Dairy-Tenn. and Ky. (NFO Proposed Fdg. 1068, rejected, 510 F.Supp. at 475); (5) Foremost-Springfield (NFO Proposed Fdg. 1132, rejected, 510 F.Supp. at 476); (6) Ewald Dairy-Minn. (NFO Proposed Fdgs. 1607-08, rejected, 510 F.Supp. at 490); (7) Steffen Dairy-Kansas (NFO Proposed Fdgs. 1875-76, 1879, rejected, 510 F.Supp. at 497); (8) Page Milk Co.-Kansas (NFO Proposed Fdgs. 1926-27, 1930-31, rejected, 510 F.Supp. at 499); (9) Hyde Park Dairy-Kansas (NFO Proposed Fdgs. 1886-88, rejected, 510 F.Supp. at 497); (10) Hawthorne-Mellody-Missouri (NFO Proposed Fdgs. 1940-41, rejected, 510

Brief at 48).

Defendants point out that a substantial number of NFO's proposed findings of fact, resubmitted on remand in exactly the same form as originally submitted at trial, were predicated on the conduct of defendants described in NFO's proposed trial findings 128-340, 469-2017. See, for example, NFO proposed damage findings of fact, paragraphs 2298-2312, 2323-25, 2331-44, 2355-58, 2360, 2362, 2364, 2366, 2368.[10]

The fourth major contention made in defendants' measurement brief was stated as follows: "Nathan's damage theories and projections are predicated upon assumptions not supported by the trial record which renders them speculative and inadmissible." Defendants do not repeat in this part of their brief their earlier discussion of what they earlier described as the "two major assumptions" that they contend NFO and Dr. Nathan relied upon in fashioning and presenting NFO's damage theories and calculations.[11]

F.Supp. at 499); (11) Carnation-Texas and Oklahoma (NFO Proposed Fdgs. 492, 539, 541, 545-46, 567, 748-750, 755, rejected, 510 F.Supp. at 459, 461-62, 466); (12) Schepps-IDC-Jere Dairy (NFO Proposed Fdgs. 535-36, 556-57, 568, rejected, 510 F.Supp. at 461-62); (13) Fairmont Foods-Okla. (NFO Proposed Fdgs. 767-69, rejected, 510 F.Supp. at 467); and (14) Marigold Foods-Minn. (NFO Proposed Fdg. 1712, rejected, 510 F.Supp. at 493)."

[10]Defendants stated in a footnote to its citation of the above paragraphs of NFO's proposed damage findings that: "It is also significant that in its Responses to Defendants' Joint Proposed Phase II Findings of Facts and Conclusions of Law, at p. 209, filed June 2, 1980, NFO further asserted that *Nathan's 'assumption of anticompetitive conduct is supported by [NFO proposed findings] 128-340, 469-2017.'* (Emphasis added by defendants)." (Meas. Brief at 49, n. 9.).

[11]The two "major assumptions," according to defendants' contentions were that "(1) the defendants engaged in illegal restric-

Rather, defendants argue that in "addition to his major assumptions related to defendants' alleged restrictive practices and NFO's capability, Nathan also relied upon a host of other assumptions in projecting NFO's expected 'but for' performance, all of which were crucial to his damage calculations but were not proved at trial." (Meas. Brief at 74). Defendants stated that the additional assumptions relied upon by NFO and Dr. Nathan included the following assumptions:

1. That a major milk marketing organization is one with 5% or more of the milk pooled on a particular federal order. *Id.* at 75.

2. That NFO would have entered each of the ten damage orders on the dates assumed by Nathan as given to him by NFO counsel but for the defendants' assumed wrongful acts and practices. *Id.* at 75.

3. That NFO would achieve its projected market shares in equal annual increments within three years of its assumed date of entry in each of the ten damage orders.[12] *Id.* at 75.

4. That once NFO attained its projected shares in the ten damage orders, it would thereafter maintain them. *Id.* at 76.

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tive practices against NFO that precluded NFO from obtaining ten to twenty percent of the milk volumes and producers pooled on the ten damage orders, and (2) NFO had the capability of marketing raw milk to the extent projected by Nathan but for the assumed restrictive practices." (Meas. Brief at 73-74).

[12]Defendants point out that throughout the pretrial phase of the case, Dr. Nathan assumed that it would take five, rather than three years for NFO to achieve its projected market shares. Defendants also direct attention to the fact that Dr. Nathan did not know who made the decision to use the shorter three-year period that was used at trial.

5. That individual federal milk orders are separate economic markets.[13] *Id.* at 77.

6. That the ten damage orders are comparable based solely upon the degree of "concentration" in them in 1969, which "concentration" would not vary thereafter. *Id.* at 78.

7. That old Order 68 (Twin Cities) is reasonably comparable to the other nine damage orders so that NFO's experiences on Order 68 were properly transferable to the other damage orders. *Id.* at 79.

8. That NFO's net dues receipts were $60.83—$62.20 per member and its net checkoff fees were three cents per hundredweight. *Id.* at 80.

9. That NFO members regularly paid their NFO membership dues. *Id.* at 84.

10. That no NFO producers located in the ten damage order area marketed their milk on orders outside of that area, that no NFO dairy farmers marketed their milk through other organizations, and that NFO's membership and milk volume data were accurate. *Id.* at 85.

11. That but for the alleged restrictive acts and practices of the defendants, NFO would have imposed a 2¢ per cwt. dairy bargaining expense checkoff in January, 1972, and a 6¢ per cwt. dairy bargaining expense checkoff in early 1976. *Id.* at 87-88.

The major thrust of defendants' arguments in support of their fourth major contention are based on the general proposition that NFO's and Nathan's reliance upon assump-

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[13]Defendants state, among other things, in connection with this point that "[t]his Court found and concluded that federal milk orders are not economic markets for purposes of antitrust market analysis (510 F.Supp. at 502)" and "[t]his finding was affirmed on appeal. (687 F.2d at 1192)." (Meas. Brief at 77).

tions which are not supported by the record destroys all of NFO's damage computations.

Defendants' arguments, of course, are founded on their view that the testimony of defendants' witnesses, particularly that of Dr. Babb, should be accepted rather than the testimony of NFO's witnesses, particularly that of Nathan. Defendants, of course, also argue that principles of law stated in cases such as *MCI Communications, supra,* should be applied to the factual circumstances which defendants contend are established by the record in this case.

The fifth and final major contention made in defendants' measurement brief was stated as follows: "NFO's damage theories for recovery of alleged lost dues and checkoff fees are speculative and based on guesswork." *Id.* at 92. The final part of defendants' brief again attacks NFO's "market structure" theory on the ground that the average poolings to the ten damage orders "is not a legally permissible damage theory"; that such theory "is predicated solely upon unsupported and speculative assumptions"; that the theory "produces absurd results not to be expected in the real world"; and that such theory is therefore "illegally speculative and conjectural." *Id.* at 93, 94, 96 and 100.

NFO's "test market" theory was again attacked on the ground that NFO's attempt to base that theory on its 1973 performance on Old Order 68 "is not a legally permissible damage theory." Defendants argue, in general, that experience on a single federal milk order may not properly be used to determine expected performance on other federal milk orders and defendants further argue, in particular, that Old Order 68 could not be used in any event for the reason that NFO failed to establish that Old Order 68 was reasonably comparable to the other nine damage orders. Defendants further argued that NFO's 1971-1973 poolings on Old Order 68 were unique to that order and that NFO failed to consider any of its experience on that order after 1973.

Defendants final argument in its measurement brief was based on a comparison of NFO's performance in the ten damage orders with NFO's performance on other market orders which NFO entered but where damages are not claimed. Defendants rely on the analysis made by defendants' witnesses Dr. Babb and George Hansen of NFO's 1970-1977 experience on every market order that NFO entered during those years. Defendants contend, on the facts, that the Babb-Hansen analysis "shows that NFO did much better in the damage orders in terms of percentages of milk volumes pooled that it did in the other orders during the period 1970 through 1977."[14] Defendants thus argue that "NFO's superior performances in the damage orders shows that if predatory practices existed there, they did not impair NFO's ability to obtain customers and producers" and that "[t]he hypothesis that NFO was injured by predatory practices in the damage orders in failing to obtain dairy farmer members or customers must therefore be rejected." (Meas. Brief at 134).

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[14]Defendants, in reliance upon that testimony attached Table I to its proposed measurement of damages findings of fact, and argue that NFO's annual poolings on the 10 damage orders and on the 17 non-damage orders during 1970-77 may be summarized as follows:

During the period 1970-77, inclusive, NFO's percentages of milk volumes pooled annually in the damage and non-damage orders were as follows:

Year	Damage Orders	Non-Damage Orders
1970	0.623%	0.073%
1971	1.914%	0.333%
1972	3.008%	1.428%
1973	3.637%	2.225%
1974	3.368%	2.432%
1975	3.185%	2.257%
1976	3.205%	2.165%
1977	2.701%	1.782%

NFO's Reply Causation Brief

NFO's reply brief, filed in response to defendants' causation brief, also responded to the portions of defendants' measurement brief which NFO believed to relate to causation issues. The basic thrust of NFO's causation reply brief is set forth in the first paragraph of that brief. NFO there stated that, under its view of this case on remand, NFO, as a private antitrust plaintiff, "is required to establish three elements; (1) a violation of the antitrust laws (violation); (2) cognizable injury attributable to the violation (fact of injury); and (3) the approximate amount of the damage (amount of damage)." (NFO's Causation Reply Brief at 1-2). NFO then argued that the "Eighth Circuit's August 31, 1982 liability decision conclusively establishes that NFO has already satisfied the first two elements of its three part burden" and that "[o]nly one task remains; a reasonable estimation of NFO's damages." (Causation Reply Brief at 2).

In a footnote on page 2 of its causation reply brief NFO makes clear its view of the impact of the Court of Appeals' directions on remand by stating that "[c]ontrary to defendants' assertion that the 'threshold factual issue [of] causation is very much alive', causation was an integral aspect of the Eighth Circuit's liability decision" and that "[t]hus, Defendants' 98 page causation brief is just one more futile chapter in their long line of attempts to relitigate issues already conclusively determined by the Eighth Circuit." *Id.* at 2, n. 4.

Although NFO quoted as a text at the outset of its causation reply brief that portion of the Court of Appeals' opinion which stated that "the case is remanded for a determination of the amount of damages NFO *may* recover," (emphasis ours) 687 F.2d at 1179, it is clear that NFO places much greater reliance upon that portion of the Court of Appeals' opinion which stated, on remand, "the district court has rather broad latitude in assessing the amount of

damages which NFO *shall* recover," (emphasis ours) 687 F.2d at 1210.

NFO cited *Zenith* and *Bigelow* numerous times in its reply causation brief and, indeed, in all of its briefs filed after remand. NFO basically contends that when the Court of Appeals cited those two cases in support of its statement that "the district court has rather broad latitude in assessing the amount of damages which NFO shall recover" that the Court of Appeals made an "explicit holding" that NFO was entitled to recover damages on the basis of the evidence NFO adduced at trial and that the only task that this Court must perform on remand is to make what NFO calls a "reasonable estimation" of NFO's damages.

NFO argued on pages 6 and 7 of its causation reply brief that "in order to recover on the basis of an estimate of its damages, a plaintiff need only establish 'some causal connection' between defendants' unlawful acts and plaintiffs' injuries, and this causal relationship 'may properly be a matter of inference from the circumstances and evidence as a whole.' "[15] After properly noting that the Court of Appeals found the "fact of injury" in regard to Wanzer Dairy, the Beatrice cutoff, and Foremost's subsequent rejection of particular shipments, NFO argued on page 12 of its causation reply brief that "[o]nce the 'fact of injury' is established, an antitrust plaintiff need only show 'some causal connection' between the defendants' violation and the amount of plaintiff's damages."

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[15]NFO cited "687 F.2d at 1209-10" of the Court of Appeals' opinion to support the quotations within the quotation this Court has made from pages 6-7 of NFO reply brief. We find that no language on the cited pages of the Court of Appeals' opinion may properly be said to support NFO partial quotations. Indeed, what the Court of Appeals said on both the cited pages of its opinion can be read to point out various factual questions in regard to NFO's damages that were open for consideration and decision by this Court on remand.

NFO's causation reply brief argued that the arguments made in defendants' causation brief were "based solely on a tortured mischaracterization of the Eighth Circuit's opinion" and that defendants "have misconstrued the Eighth Circuit's decision." NFO suggested that it has always "proposed to measure its lost market penetration damages using the general test market/market structure approach" and that the "Eighth Circuit never said that such approach could not be used to measure 'the extent [NFO's] losses are reasonably shown to be caused by the antitrust conspiracy.' " "To the contrary," NFO's reply brief argument continued, "the Eighth Circuit affirmatively *endorsed* NFO's damage theory by directing this court's attention to *Zenith, supra* and *Bigelow, supra,* as the cases governing NFO's damages measurement proof. (687 F.2d at 1210.)" [Emphasis in the original].

Part V of NFO's causation reply brief contains 80 pages of discussion under a heading which stated that "NFO's inability to achieve its projected market penetration was the direct and intended result of defendants' illegal predation." *Id.* at 63. Although NFO stated on page 71 of its causation reply brief that it had made a full reply to defendants' factual contentions in its response to defendants' proposed findings of fact relating to causation, that brief contains but a lengthy discussion of "added examples of predation."

NFO's detailed discussion of what it contends was established by the evidence in the case was made in response to what NFO argued was the defendants' "final acknowledgement" that defendants have the burden of proof on remand to establish that "NFO's inability to prosper was *'solely attributable'* to causes other than defendants' illegal conduct" and that because "defendants have fallen far short of proving that NFO's losses were 'clearly' or 'solely' attributable to NFO's alleged ineptitude," NFO is accordingly

entitled to recover all of the damages it has claimed. *Id.* at 64.[16]

NFO's reply brief (page 69) also purported to state the reason why NFO elected to stand on the record made at trial rather than electing to have the record reopened after remand. NFO first stated that the "Eighth Circuit has already found that the fact of NFO's injury is 'unmistakable' and that this injury took the form of lost membership dues and check off fees stemming from market foreclosure. (687 F.2d at 1210)" and that, thus, "the Eighth Circuit has already found the existence of 'some' injury, *i.e.,* 'some' market foreclosure." NFO then states that the "only question remaining is the extent of that market foreclosure." NFO flatly stated "[t]hat question is answered by NFO's damage analyses."

NFO's causation reply brief made clear that NFO rests its entire damage case on "NFO's damage analyses" adduced at trial. The basic theory stated in NFO's causation reply brief is that the extent that NFO, in fact, lost membership dues and the extent that NFO, in fact, lost check off fees was reasonably shown by the damage analyses adduced at trial.

NFO's detailed discussion of "defendants' concerted predation" on the various market orders was focused solely on

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[16]NFO's "burden of proof" argument is reiterated on page 68 of its reply brief. NFO there stated that "in order to establish that NFO's loss of dues and fees was *'solely attributable'* to NFO's alleged ineptitude, defendants would have to establish that their coercion, discriminatory pricing, harassing litigation, etc.—conduct they have been convicted of—had *no* impact on NFO's access to markets or ability to recruit producers." NFO contends that it is entitled to recover all the damages it has claimed because "[t]his is a burden that defendants can not satisfy." See also page 97 of NFO's reply brief where NFO states in a footnote that: "Defendants of course recognize that only by proving that NFO was the *sole* cause of its injury can they avoid paying substantial damages." (Emphasis in the original).

whether defendants had carried the burden of proof which NFO contends that defendants must carry in order to prevent NFO from recovering all of the damages claimed by it under the "damage analyses" that NFO advanced through Nathan at trial.

NFO's Measurement Reply Brief

NFO introduced the arguments made in its measurement reply brief with the statement, based as usual on a citation of *Zenith* and *Bigelow,* that the "essential point that the defendants miss in opposing NFO's measurement of its lost market penetration damages is that an antitrust plaintiff who has been unlawfully excluded from the market in whole or in part need only prove his damages by a *reasonable* estimate." (Emphasis in the original).[17] (Measurement Reply Brief at 1-2). NFO concluded the introduction section of that brief with the statement that "the defendants have said nothing that refutes [the] reasonableness [of NFO's damage measurements.]" (Measurement Reply Brief at 5).

Part II of NFO's measurement reply brief is captioned "NFO properly relied upon the expertise of economic expert Robert Nathan in measuring its lost market penetration damages." (*Id.* at 5). NFO conceded, as it must, that "Nathan operated on the basis of assumptions supplied to him by others." (*Id.* at 7). Specifically, NFO stated that "Dr. Nathan did unquestionably assume that NFO was injured by defendants' antitrust conspiracy, and that NFO had the capability to become a major milk marketer." (*Id.* at 10).

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[17]NFO reiterated that argument numerous times in its measurement reply brief and other briefs filed after remand. See for example, NFO's repeated argument on page 4 of its measurement reply brief: "the Supreme Court in *Zenith* and *Bigelow* directed that the proper standard for measuring antitrust damages be one of reasonableness. What is most apparent about defendants' opposition to NFO's damage measurements is their total disregard for the teachings of *Zenith* and *Bigelow.*"

NFO argues that the correctness of the first assumption was established by the Court of Appeals' determination that the "fact of NFO's injury" was established by trial record. In regard to Nathan's second assumption, NFO argued that "NFO's capability in dairy—is fully supported in the record, by NFO's witnesses and, most convincingly, by the undeniable fact that, in addition to the test market Order 68, NFO *did* succeed remarkably well in Chicago and the Southwest—until, as specifically found by the Court of Appeals, the defendants decimated the NFO program." (Footnote omitted). (Emphasis in the original).[18] (Measurement Reply Brief at 10-11).

NFO conceded that Dr. Nathan made "certain judgments" when he formulated "NFO's market-structure method for measuring damages" (*Id.* at 12). NFO argued that "[t]hese judgments, however, were all reasonable." (*Id.* at 12). NFO specifically argued that Nathan's "judgments" were reasonable because "[h]e relied upon Messrs. Hammond and Dahl," described by NFO as "well respected agricultural marketing analysts," and that he reasonably used a "rounded-off 5% standard" for determining whether a supplier had crossed the "major" market share threshold. (*Id.* at 13). NFO further argued that the three-year growth period Nathan elected to use, was not "plucked out of thin air; it had an actual empirical basis, i.e., NFO's experience in old Order 68." (*Id.* at 13).

NFO implicitly conceded that defendants have what NFO called "the empty, abstract opinion of Mr. Babb" in opposition to NFO's ability to grow as projected by Nathan, but NFO suggests that Babb's testimony should be totally disregarded because "Mr. Babb's view is worse than mere

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[18]NFO also argued that "Dr. Nathan's assumptions of injury and capability" were also established by defendants' recognition of "NFO's capability to become a major marketer—that is exactly why they went to such lengths to throw NFO out of the market."

speculation because his opinion collides squarely with NFO's history." (Measurement Reply Brief at 14-15).

In response to defendants' arguments that Nathan should have considered various other "economic factors" in his evaluation of NFO's potential growth, such as NFO's "ability to attract producers and handlers, experiences in other areas, and the like," NFO conceded that "Nathan did not examine these 'economic factors.' " NFO argued, however, that such "economic factors" are "in reality only components of NFO's capacity in dairy" and that Nathan did not need to examine those factors for the reason that he had, properly according to NFO, "assumed that NFO was capable of becoming a major milk marketer."[19] (Measurement Reply Brief at 18).

As would be anticipated, in the section of NFO's measurement reply brief devoted to "The Test-Market Method" (p. 26) it is argued that "[t]he selection of old Order 68 as NFO's test market was proper in all respects" and that the "record evidence on comparability in fact establishes that Order 68 was a valid test market for projecting losses in other damage markets."[20] (*Id.* at 7).

NFO contends that all of defendants' arguments made in regard to NFO's test market method wander "from the accepted standard, which is the use of a reasonable basis for

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[19]NFO repeated its argument that "[t]his assumption is, of course, fully supported in the record and by NFO's track record in Chicago, the Southwest, and Order 68." NFO added an additional argument that suggested that Nathan had reasonably relied on "NFO's membership base [as] the most important factor in evaluating NFO's capability" and that "he determined the facts on that point himself." *Id.* at 18.

[20]NFO cites pages 23-24 of its original damage brief to support its statement that "[t]he record on comparability in fact establishes that Order 68 was a valid test market." Examination of those pages of that brief reveals very little citation of the record.

estimating damages." (*Id.* at 34). NFO argued that because "[f]ederal orders are regulated and have government-gathered and collated statistics" those federal orders "are thus reliable economic units providing a reasonable basis for estimating NFO's damages; this is all that is necessary." (Measurement Reply Brief at 35).

In the "conclusion" portion of its measurement reply brief NFO reiterates the basic argument stated in the first sentence of that brief by stating that what "defendants have most consistently done throughout 238 pages of briefs is to completely ignore both the reasonableness standard enunciated in the controlling cases of *Zenith* and *Bigelow*, and the 'broad latitude,' as the Eighth Circuit put it, that this Court has 'in assessing the amount of damages NFO *shall* recover.' 687 F.2d at 1210 (emphasis added by NFO)." (Measurement Reply Brief at 45). NFO's brief concluded with the following sentence: "To prevent defendants from profiting from their years of concerted predation, and to compensate NFO and its dairy farmer members for the devastation defendants have wantonly inflicted upon them, NFO prays for damages in the amount of $12,947,034, trebled to $38,841,102, and the undersigned NFO class claimants pray for damages in the amount of $1,075,383, trebled to $3,226,149." (*Id.* at 46).

Having covered the arguments made by the parties in their briefs filed in connection with the issues under discussion, we turn now to a more detailed discussion of NFO's lost market penetration damage computation theories.

NFO'S LOST MARKET-PENETRATION DAMAGE COMPUTATION THEORIES

I.

By way of introduction, it is appropriate to note that in the conclusion portion of its brief in support of its motion for damages NFO directed attention to what the Court of

Appeals had to say about the familiar cases of *Eastman Kodak* and *Story Parchment* in *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28 (8th Cir.1966). As the record shows, this Court has been frequently reminded of the *Arthur Murray* litigation a number of times during the trial and determination of this case.

This Court's determination of the defendants' liability in *Arthur Murray* and the reasons this Court believed that the appointment of a Special Master was necessary in determination of the amount of plaintiff's damages was published in *Reserve Plan, Inc. v. Arthur Murray*, 38 F.R.D. 23 (W.D. Mo.1965).[21] After finding the defendants to be liable for antitrust violations and after a detailed review of all pretrial orders entered by both judges and of plaintiff's failure to comply with those pretrial orders, we stated that "[s]ince 1961 the two judges who have had the responsibility for seeing that this case be tried have been spectacularly unsuccessful in their efforts to get the plaintiff to prepare and present its case on damages in a manner that can be judicially understood."[22] The Court of Appeals partially approved the appointment of a Special Master in *Arthur*

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[21]Later opinions of this Court, all written on the question of the amount of plaintiffs' damages are reported in 262 F.Supp. 565 (W.D.Mo.1967) and 301 F.Supp. 621 (W.D.Mo.1969). There is no need to make any further reference to those later opinions. Nor is it necessary that any detailed reference be made to the Court of Appeals decision in *Arthur Murray II*, 406 F.2d 1138 (8th Cir.1969), other than to state that the Court of Appeals appropriately noted the "thorny history" of the case and the "most vexatious problem" created by plaintiffs' failure to comply with pretrial orders in regard to a consistent theory of damages.

[22]*Reserve Plan, Inc. v. Arthur Murray, Inc.*, 38 F.R.D. 23, 35 (W.D.Mo.1965). We further stated that as a result of plaintiff's failure properly to prepare its damage evidence, that "[p]laintiff's accounting evidence on damages, as a practical matter, was assembled in final form during the trial itself." *Id.* at 33.

Murray I but vacated a portion of this Court's order of reference which would have enabled the Special Master to reopen the record and to review additional available relevant factual data on the issue of the amount of plaintiff's damages which had not been offered in evidence by either side during the trial of the case.

This Court applied principles established by the Court of Appeals in *Arthur Murray I* when we made repeated and exhaustive inquiry as to whether NFO wished to have the record in this case reopened for the purpose of adducing additional evidence consistent with the Court of Appeals discussion of damages and its statement that further proceedings might be appropriate.

Arthur Murray I required the consideration by the Court of Appeals of a record which showed that the district court had already made a finding that "the record contained such evidence of damages as could afford the basis for the rendering of a substantial verdict in plaintiff's favor." *Arthur Murray, Inc. v. Oliver, supra,* 364 F.2d at 30. The purpose of this Court's initial order appointing a Special Master was to reopen the record to receive *additional* accounting books and records that its study of the record established were in existence.

The Court of Appeals in *Arthur Murray I* recognized that a trial court has "the general power to reopen a case, either on motion of a party or on its own motion, while the matter is still under advisement, for the receipt of further evidence." *Id.* at 34. It concluded, however, that recognition of that power "may not be taken to imply that a court is entitled to engage freehandedly in adding evidence to a record on its own motion" and firmly stated that "it is not the business of a court to make additions of evidence in a submitted case on its own motion other than as there may be some element of such probative importance that its

addition will prevent a miscarriage of justice from occurring in the situation."[23] (*Id.* at 34).

[5] The primary lesson taught in *Arthur Murray I* was that a district court must refrain from reopening a case on its own motion in all but highly exceptional cases and that it should not consider doing so except to prevent a miscarriage of justice. Application of that principle in the circumstances of this case requires a finding that NFO must be held to its election to rely on the record made at trial and on the findings of fact which NFO initially proposed on the damage issues discussed in the Court of Appeals' opinion in this case.

We now turn to a detailed analysis of NFO's lost market penetration damage computation theories upon which NFO bases its claim that it should recover millions upon millions of dollars from the defendants.

II.

In the conclusion portion of its supporting brief NFO stated that the amount of damages claimed by NFO "represents the average damage amount arising from two reasonable methods of estimating NFO's lost market penetration damages." (Brief in Support of Mot. for Damages at 46). The summary of NFO's damage computations, which was attached to its supporting brief as Appendix A, set forth NFO's claim that "the total average amount of NFO's lost-market penetration damages is $12,947,034, which must be trebled to $38,841,102."

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[23]The Court of Appeals further stated that while it could "sympathize with the Court's conscientious desire here to have as full a probative basis as possible for arriving at the damages involved" that it nevertheless "is not given to a judge to engage in a prospecting quest for other evidence possibility to add to a record." *Arthur Murray I, supra,* 364 F.2d at 34 and 35.

Although Part XV of NFO's original proposed findings of fact, entitled "NFO lost penetration damages," contained 390 separate proposed findings of fact set forth on 132 legal size pages, the summary contained in Appendix A attached to its supporting brief makes reference to a substantially smaller number of proposed findings of fact upon which NFO presently bases its damage claim. We have carefully reviewed all of NFO's original 390 proposed findings, compared them with those cited in the Appendix A summary, and conclude that the proposed findings cited in the Appendix A summary set forth NFO's theories of its alleged lost market penetration damages in sufficient detail to confine our discussion and analysis of NFO's theories as reflected by the proposed findings of fact contained in NFO's Appendix A summary.

Appendix A, for example, accurately states that NFO's alleged lost market penetration damages as claimed under NFO's test-market (10.5%) method were calculated under NFO proposed findings of fact paragraphs 2299-2312 (NFO P.F. 2299-2312),[24] that its market-share method of damage calculation was made in accordance with NFO P.F. 2331-44, and that the estimated volumes of milk that would have been pooled by NFO and other data are summarized by various NFO exhibits cited in connection with those proposed findings of fact.

We turn now to NFO's proposed calculations of its alleged market penetration damages.

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[24]We adopt NFO's system of citing the paragraphs of the findings of fact proposed by NFO at trial. "NFO P.F. 2299-2312," as illustrated above, is a short hand reference to "NFO Proposed Findings of Fact, paragraphs 2299-2312," as made by NFO at trial.

III.

NFO cited only nine pages of Nathan's testimony on direct examination (Tr. 9660-69) and NFO Exhibits 1015 and 1019 to support the thirteen proposed findings of fact which set forth NFO's "test-market (10.5%) method" (NFO P.F. 2299-2312) and its "market-share method" (NFO P.F. 2331-44) under which NFO would have this Court "estimate the volume of milk that NFO would have pooled in the absence of market restraints." NFO recognized that such a factual finding represents an essential first step in NFO's proposed calculation of its "lost marketing expense checkoff fees."

NFO also cited and relied on the six additional paragraphs of its originally proposed findings of fact, NFO P.F. 2264-65, 2286, and 2287 (test-market) and 2273 and 2275 (market-share) to support various paragraphs of the same thirteen proposed findings.

As will be noted later, each of those additionally cited proposed findings of fact, in turn, cited a number of other of NFO's original proposed findings of fact. The cited pages of Nathan's testimony reflect no more than Nathan's description of NFO Exhibits 1015 and 1019.[25]

As noted above, paragraphs 2264-65, 2286, and 2287 of NFO's proposed findings of fact are cited to support NFO's test-market (10.5%) method. Paragraph 2264 of NFO's proposed findings of fact would have this Court find as a matter of fact that "[t]he penetration (in terms of volume of milk pooled) achieved by NFO in Federal Milk Market Order 68 in 1973 (10.5%) is an appropriate measure of the minimum penetration which NFO would be expected to have made, with comparable effort, in comparable markets,

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[25]NFO Exhibit Nos. 1014(a), 1016, 1017, and 1020, all of which are related to NFO Exhibit Nos. 1015 and 1019, were also mentioned on some of the nine pages of Nathan's testimony.

but for the conduct of the defendants described in P.F. 128-340, 469-2017."

NFO cited Nathan's direct testimony on pages 9584-99 and 9629-35 of the transcript to support that key proposed finding of fact. Nathan gave a negative answer to the question "Do you consider yourself an expert in milk marketing, Mr. Nathan"? (Tr. 9629). On page 9584 of the transcript, Nathan made clear that it was "NFO counsel," rather than he, who had initially proposed the use of the yardstick or test market method of calculating NFO's damages. And on page 9633 of the transcript, Nathan testified as follows in regard to Order 68, the market order which had been selected as the "test market":

> Q. Where did you get your understanding about the existence of any exclusionary or restrictive practices in Order 68?
>
> A. NFO counsel.
>
> Q. And have you checked that?
>
> A. No, sir.

(Tr. 9633).

In regard to the assumption that must be made in regard to NFO's efforts to penetrate the various damage markets, Nathan testified as follows:

> Q. Is there anything that you must assume about that point, about the effort?
>
> A. Well, certainly you must assume that either the company did make a similar or identical effort or reasonably identical effort or it would have but for the restrictive practices.

(Tr. 9591).

The assumption actually made by Nathan in regard to the efforts made by NFO was stated as follows:

Q. Have you made any assumptions about the comparability of NFO's efforts in markets other than the test market?

A. The only assumption that it did or would have made the same effort had it not been for the constraints. That is an assumption, yes, sir.

(Tr. 9592-93).

Nathan further testified that the "most important" factor which he took into account to justify the assumption of NFO's capability in the various markets was NFO's membership in the various damage markets. (Tr. 9594). Pages 9595-99 reflect the fact that NFO was unable to adduce any credible evidence in regard to NFO's membership in general and in regard to how many dairy farmers may have actually been active members of NFO at any particular time. Accordingly, those pages of the transcript outlined the method that Nathan used to "analyze" (Tr. 9595) the NFO dairy farmer membership. (Tr. 9595-99). Pages 9629-35 of the transcript of Nathan's direct testimony was devoted to a general discussion of NFO's Exhibit Nos. 1014(a), 1015-21, 1024-39, 1040, 1041, and 1225. All of those exhibits, together with a number of other NFO damage exhibits are included in Appendix E attached to NFO's brief in support of its motion for damages.[26]

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[26]We have considered all the NFO exhibits included in NFO's Appendix E, together with a great many other exhibits introduced by both NFO and the defendants in our effort to find some reasonable method of calculating the damages which the Court of Appeals assumed that NFO was entitled to recover.

That effort was made consistent with *Bigelow's* established standard that "where the defendant by his own wrong has prevented a more precise computation," the finder of fact "may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." 327 U.S. at 264, 66 S.Ct. at 579. *Bigelow*, however, also established that the finder of fact "may not render a verdict based on speculation or guess-

NFO cites F. 105-6, 2211-2212, 2215-16, 2239, 2260-61, and 2265 to support paragraph 2264 of its proposed findings of fact. This Court has heretofore expressly rejected paragraphs 105 and 106 of NFO's proposed findings of fact. Those proposed findings of fact will be set out in the next part of this opinion and will be discussed in connection with NFO's market share theory.

While we believe it is generally true that a "new entrant in a market with an undifferentiated product will generally seek to make sales through price competition" (NFO P.F. 2211) and that "[m]arket entry in a concentrated market with an undifferentiated product will generally be facilitated by the desire of customers to have competing supplies" (NFO P.F. 2212), we do not believe that those general propositions either support NFO P.F. 2264 or NFO's test market theory.

The other proposed findings cited to support NFO P.F. 2264 (NFO P.F. Nos. 2211-12, 2215-16, 2239, 2260-61 and 2265), with one exception, were based solely on Nathan's direct testimony in which he described NFO Exhibit Nos. 1014, 1222, and 1223.

The exception related to citation of other data to support NFO P.F. 2265 which proposed that this Court find that on all the damage market orders (other than Order 68) "NFO either: exerted efforts to penetrate comparable to those it exerted in Order 68; or would have exerted such effort but for the defendants' conduct described in F. 128-340, 469-2017." NFO cited particular pages of testimony given by

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work." *Id.* The ultimate determination of the NFO's alleged lost market penetration damage claim presents the question of which of the two principles stated in *Bigelow* is applicable to this case.

Staley, Scott, and Berkhahn and "F. 436-43, 1598, 1830, 2276-85" to support that proposed finding of fact.[27]

Reference to 510 F.Supp. at 454 establishes that we have heretofore refused to find most of the facts proposed in paragraphs 436-43 of NFO's proposed findings in the form originally proposed by NFO. Indeed, reference to NFO's proposed findings and to the findings made by this Court in 510 F.Supp. at 454 shows that NFO relied upon the same testimony from Staley, Scott, and Berkhahn but that this Court either rejected outright or substantially modified all of NFO's proposed findings.

NFO's proposed paragraphs 436-443 were under a general heading entitled "NFO Focuses Grade A Dairy Program in Midwest." We refused to accept the testimony of Staley, Scott, Berkhahn, and Avila cited by NFO to support the following proposed findings:

> 436. After starting its Grade A milk marketing program in southwest Missouri and Wisconsin, NFO planned to expand that program to cover the heart of the Midwest, where NFO was the strongest. [Rejected]
>
> 437. For NFO, the heart of the Midwest included Wisconsin, Minnesota, Iowa, Missouri, Illinois, Kansas and Nebraska. [Rejected]
>
> 439. NFO expected to be able to begin marketing throughout the Midwest within about six months from the time it began marketing milk in southwest Missouri and Wisconsin. [Rejected]
>
> 442. NFO's dairy program was focused on the Midwest, i.e., Wisconsin, Minnesota, Iowa, Missouri, Illinois, Kansas and Nebraska. [Rejected]

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[27]NFO P.F.'s 2276-85 were based solely on Nathan's reiteration of the figures contained in NFO Exhibit 1016 and needs no further discussion.

443. All three assistant directors in the NFO Dairy Department focused their attention on the Midwest through 1971. [Rejected]

We modified NFO's proposed findings in paragraphs 438, 440, and 441 to read as follows:

438. After starting out in southwest Missouri and Wisconsin, NFO ~~planned~~ [hoped] to expand its Grade A milk marketing program into Minnesota, Iowa, Illinois, Kansas and Nebraska as soon as it found buyers there.

440. NFO ~~expected~~ [hoped] that its Grade A milk marketing program would spread from southwest Missouri and Wisconsin through the Midwest within about six months because its programs for other commodities had done so.

441. NFO ~~began establishing~~ [established] milk reloads in southwest Missouri and Wisconsin in 1969.

The record in this case, see 510 F.Supp. at 490, establishes that we refused to accept Berkhahn's cited testimony as supporting of NFO P.F. 1598, which NFO has cited to support NFO P.F. 2265. NFO P.F. 1598 proposed that we find that "[i]n 1970-1971, any NFO attempt at starting up a dairy program in the Fergus Falls, Minnesota, area was foreclosed by lack of manufacturing outlets." 510 F.Supp. 496 shows that we did find, in accordance with NFO P.F. 1830, that "[m]arketing problems in Minnesota, Wisconsin, and elsewhere diverted Berkhahn's efforts from the Nebraska Order 65 during 1971 through 1975." That finding of fact, however, can not be said to support NFO P.F. 2265.

NFO P.F. 2286, which merely states the fact that a new Upper Midwest Order 68 was established effective June 1, 1976, is cited as additional support for NFO P.F. 2301 and 2303 which proposed that we find that had old Orders 60 and 61, respectively, continued to exist, NFO would have pooled exactly the same volume of milk in each of the years 1976 through 1982 that it would have pooled on each of those orders in the year 1976. NFO P.F. 2312 cited NFO 2287 to support the same sort of proposed finding in regard

to old Order 126 which, together with five other market orders, was merged into new Texas Order 126.

The figures which reflect the projections adopted by Nathan in his testimony are reflected in NFO Exhibits No. 1015 and 1019 but no evidence other than Nathan's testimony and the other data discussed above was adduced by NFO to support the reasonableness of that sort of an assumption.

IV.

Appendix A to NFO's supporting brief identifies NFO P.F. 2331-44 as its proposed findings that purport to establish the validity and reasonableness of its market share method of calculating NFO's alleged loss of marketing expense checkoff fees. Each of those proposed findings, however, rest solely on NFO Exhibit Nos. 1015 and 1019, Nathan's description of those exhibits on direct examination, and NFO's P.F. 2273 and 2275. NFO P.F. 2273 proposed that we find that NFO had the potential, as a new entrant in each damage order to achieve in three years after it entered each such order, the "shares of milk pooled" on each of those market orders that are set forth on NFO Exhibit 1014(a). NFO P.F. 2275 would have this Court find that it took three years from the time NFO entered Order 68 for it to obtain an annual 10.5% of all milk pooled on that market.

As was true in regard to the findings proposed in regard to NFO's test market theory, NFO cited additional proposed damage findings to support NFO P.F. 2273 and 2275, which, in their turn, had been cited to support the findings proposed in regard to NFO's market share theory. The additional proposed findings cited to support NFO P.F. 2273 and 2275 were, for the most part, set forth in the section of NFO's capability to obtain major market shares.

NFO followed the same bootstrap method of citing one proposed damage finding to support another proposed damage finding in regard to the findings proposed to establish

the validity and reasonableness of its market structure theory as it did in regard to its test market theory. The pattern of reliance upon Nathan's description of NFO's damage exhibits was the same in regard to both of NFO's theories. As was true in regard to its presentation of its test market theory, NFO did cite a few additional of its proposed findings which had been proposed outside those proposed solely in regard to the damage issues presented. But, as was true in regard to its test market theory, NFO's reliance upon findings it proposed on the issue of liability have in large part already been rejected by this Court.

For example, NFO P.F. 105 and 106, both of which are secondarily relied upon to support both NFO's test market theory and its market share theory, were as follows:

> 105. Most of the milk pooled in each of Federal Orders 30, 60, 61, 62, 64, 65, 68, 73, 106 and 126 comes from farms either within the respective order or in counties contiguous to the order. (NFO Exhs. 1046, 1475-768.)
>
> 106. Almost all of the milk pooled in each of Federal Orders 30, 60, 61, 62, 64, 65, 68, 73, 106 and 126 comes from states which are, at least partially, within the geographic area of the respective orders. (NFO Exhs. 1048, 1475-78.)

We concluded after trial, see 510 F.Supp. at 442, that NFO Exhibits 1046, 1475-78 did not support findings of fact proposed in NFO P.F. 105 and 106; that NFO had not adduced any additional credible evidence to support those proposed findings; and that, accordingly, we were required to reject both of those proposed findings.

For further example, it must further be noted that NFO cited and relied on its proposed finding as contained in paragraphs 341-468 to support its key proposed finding contained in NFO P.F. 2271 that "NFO had the capability and experience to become a major firm in Federal Marketing Orders 30, 60, 61, 62, 64, 65, 68, 73, 106 and 126." NFO P.F. 341-468 were contained in Part IV of NFO's proposed

findings of fact which was entitled NFO's Capability in Dairy.[28]

Examination of pages 454 to 458 of 510 F.Supp. establishes that while this Court agreed that the greater weight of the credible evidence adduced at trial supported a relatively limited number of the findings of fact in the language proposed by NFO, and that a substantial number of additional NFO's proposed findings shoud be made in a modified form, it is clear that this Court also expressly rejected a large number of the findings of fact proposed by NFO in regard to NFO's alleged Capability in Dairy.

Because NFO P.F. 2271 proposes that we find that NFO, in fact, "had the capability and experience to become a major firm" in each of the damage market orders, it is of paramount importance to set forth the relevant findings of fact proposed in NFO's Part IV which we expressly determined were not supported by the greater weight of the credible evidence adduced at trial.

Examination of the findings of fact proposed by NFO in Part IV (pages 62 to 76, inclusive, of NFO's proposed findings of fact) and review of the findings rejected on pages 454 to 458 of 510 F.Supp. shows that numerous paragraphs proposed in NFO's Part IV have been already expressly rejected by this Court. The following list of proposed re-

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[28]Part IV of NFO's proposed findings was divided into the following subparts: A—NFO Formation and Purpose; B—NFO's Recruiting Efforts; C—NFO Membership Structure; D—NFO Marketing Structure; E—Master Contracts; F—The Holding Action; G—NFO Revamps Dairy Department; H—Supply Contracts; I—NFO Decides to Enter Direct Marketing of Milk; J—NFO Calls Upon Experience Marketing Hogs, Cattle, Grain; K—NFO Milk Attractive to Handlers; L—NFO Focuses Grade A Dairy Program in Midwest; M—NFO Preaches Gospel to Non-Members; N—Interest in NFO Grade A Milk Marketing Grows; O—NFO's Well And Trying to Get It to Join the Club; and P—Conclusion.

jected findings fairly reflects this Court's view of what the greater weight of the credible evidence failed to establish at trial:[29]

346. Dairy farmers were as interested in joining NFO as were meat and grain farmers. [Rejected]

349. The percentage of all NFO members in an area who are dairy farmers generally corresponds to the percentage of all farmers in that area who are dairy farmers. [Rejected]

380. NFO county organizations helped NFO to negotiate master contracts in milk. [Rejected]

398. Because of the NFO supply contract program, NFO had established truck routes of farmers in the Midwest by 1969. [Rejected]

407. By 1969, NFO had attracted significant dairy farmer membership throughout the Midwest. [Rejected]

421. The distribution systems for milk, grain, cattle, hogs and all other agricultural commodities are substantially the same. [Rejected]

422. NFO's experience in marketing livestock and grain gave NFO the capacity to be a major factor in the dairy industry. [Rejected]

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[29]It is not necessary that we list all of NFO's Part IV proposed findings of fact that have been rejected. We have selected and listed only those which clearly reflected our view of what the evidence failed to establish in regard to NFO's actual capability in dairy.

It should also be stated that a number of NFO's Part IV proposed findings were rejected on grounds of relevancy. For example, we rejected the NFO P.F. 358 and 370-376, which proposed very general findings in regard to various NFO bargaining committees because the evidence established that a bargaining committee for meat and grain simply knew nothing about the complicated way milk is marketed. Proposed findings rejected for that type of reason are not included in the list of rejected findings stated in the text.

425. By making sales to high Class I utilization bottlers, NFO, even though it sold milk cheaper than AMPI, Mid-Am and CMPC, could still return as much money as or more than AMPI, Mid-Am and CMPC to dairy farmers. [Rejected]

426. NFO had the capacity to become a major factor in the dairy industry, both in sales to handlers and in providing services to farmers, because of its willingness to sell below prevailing market prices until it had established itself in those markets. [Rejected]

435. Because NFO did not operate bottling plants, it had the capacity to become a major factor insofar as sales to bottling plants were concerned. [Rejected]

468. Beginning no later than 1969, NFO has had the capability to become a major milk marketing association in each of Federal Orders 30, 60, 61, 62, 64, 65, 68, 73, 106 and 126. [Rejected]

NFO P.F. 2275, cited to support all of NFO's market structure proposed findings, in its turn cited NFO P.F. 2263, 2282, and 2298 to support a proposed finding that "[i]t took three years from the time NFO entered Federal Milk Market Order 68 for it to obtain an annual 10.5% share of all the milk pooled on that order." NFO P.F. 2263 and 2282 cited only NFO Exhibits 1016 and 1225 and Nathan's testimony which generally described those exhibits to support those two proposed findings.

NFO P.F. 2298, however, cited a number of findings proposed on the issue of liability to support its proposed finding that "NFO either entered (pooled milk) or would have entered each of the below listed Federal Milk Market Orders in the years indicated but for the conduct of the defendants described in F. 128-340, 469-2017." NFO Exhibits 191 and 1015 and the list included in NFO P.F. 2298 proposed the findings that NFO would have entered Orders 30, 62, 64, 106 and 126 in 1970; that NFO would have entered Orders 60, 61, 68 and 73 in 1971; and that NFO would have entered Order 65 in 1972.

Specifically, NFO cited NFO 846-66 and 878-909 to support NFO P.F. 2298. Those findings were among a large number of findings that NFO proposed in Part V, C, 4 and 5 of its proposed liability findings entitled "NFO's entry in milk marketing in Missouri" and NFO's "Response to the Midwest marketing."

We accepted, modified, and rejected a number of those proposed findings after trial. It is sufficient for present purposes to state that we rejected NFO P.F. 903 which stated that the "conduct of Mid-Am, AMPI, and their co-conspirators, as generally described in F. 874-902, materially contributed to Hiland's refusal to purchase raw milk from NFO beginning in early 1970."

NFO also cited NFO P.F. 878-909 to support NFO P.F. 2298. Those findings were initially proposed in Part V, C, 6 of NFO proposed liability findings entitled NFO's "Attempts to develop other markets for Missouri milk." The only rejected finding that need be detailed is our rejection of NFO P.F. 908 which stated that "Mid-Am's known policy of imposing additional charges on partial supply purchasers caused Sealtest—St. Louis to refuse to buy milk from NFO."

Our treatment of NFO P.F. 1587 and 1588 will illustrate why those proposed liability findings and the other liability findings cannot be said to support the extremely broad finding proposed in NFO P.F. 2298 which proposed that we find that NFO either entered or would have entered each of the ten orders at sometime during the years 1970, 1971, and 1972. NFO P.F. 1587 proposed that we find that "[i]n 1970 or early 1971, there were at least 200 Grade A producers in the Order 61 area interested in marketing their milk production through NFO." NFO P.F. 1588 proposed that we find "[i]n 1970 or early 1971, there were at least 200 Grade A producers in the Order 60 area interested in marketing their milk production through NFO."

510 F.Supp. at 490 shows that we modified both those proposed findings by striking the language "at least 200"

and by substituting instead the words "a number of" Grade A milk producers in Order 61 and 60 that were interested in marketing their milk through NFO. The modification of NFO's proposed findings reflected a rejection of the credibility of Berkhahn's testimony (Tr. 6470-71), allegedly based on his "experience and knowledge of the area" that at least 200 producers might have been interested in marketing through NFO in 1970 or 1971 in those two marketing orders.

That rejection of the number of producers is confirmed by NFO Exhibit 1024, which purported to state the "estimated numbers of producers who would have been pooled by NFO 1970-80." For that exhibit, the validity of which we do not accept, shows that it assumed that in Order 61 NFO in 1971 would pool only 35 producers under NFO's 10.5% theory and only 49 under its market structure theory. NFO Exhibit 1024 also assumed that in Order 60 in 1971 that NFO would pool 68 producers under its 10.5% theory and 73 under its market structure theory.

We are satisfied by our exhaustive review of the record and careful consideration of the voluminous briefs filed after remand that, in the final analysis, the question of whether NFO may properly be awarded any of its claimed lost market penetration damages turns on the question of whether Nathan's testimony and the damage exhibits relied on by NFO to support its test market (10.5%) and market share theories may properly be considered as credible relevant evidence upon which a just and reasonable estimate of damage may be based or whether a damage award based in large part on Nathan's testimony and NFO's damage exhibits would be based on speculation or guesswork.

We turn to defendants' arguments in regard to Nathan's testimony and NFO's lost market penetration damage exhibits in the next part of this opinion.

CREDIBILITY OF NFO'S LOST MARKET PENETRATION DAMAGE COMPUTATIONS

I.

Defendants have consistently and vigorously objected to and moved to preclude and strike, both at trial and after remand, Nathan's lost market penetration damage evidence. The grounds upon which defendants have in the past and presently base their efforts to preclude Nathan's testimony were accurately stated by Mr. Peterson in his oral argument on behalf of the defendants on Issue No. 4, Preclusion of NFO's Expert Witness. The factual circumstances upon which defendants base their preclusion arguments are accurately set forth in defendants' joint proposed findings of fact relating to preclusion of NFO's new damage theories at the trial and to strike Nathan's trial testimony.

The accurate factual data set forth in those proposed findings of fact were also stated at trial to support defendants' objections to NFO's proposed findings of fact 2098-2488 ("lost penetration damages") as stated on the seven pages immediately preceding defendants' joint response to paragraph 2098 of NFO's proposed findings of fact.[30] When

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[30]NFO does not raise any substantial question about the accuracy of defendants' reiteration of the factual circumstances as stated in defendants' proposed findings of fact on this issue. Rather, NFO's contentions in opposition to defendants' preclusion motions were based on the legal arguments that "a motion to preclude cannot be granted without proof of prejudice" and that "the defendants' failure to show any harm resulting from NFO's alleged non-compliance vitiates their preclusion motion." (NFO's Sugg. in Oppos. to Deft's Joint Mot. to Preclude, p. 2).

NFO also presents an argument that the record can somehow support the notion that the positions taken by the defendants in regard to NFO's failure to comply with pretrial orders somehow "engineered the acceleration of the experts' depositions" and that defendants "now seek to bootstrap NFO's acquescence to this

we initially determined the liability issues in this case we found that it was unnecessary to reach the questions of "(3) whether NFO should be precluded from asserting its claims for damages for various alleged losses because of alleged violations of Pretrial Orders Nos. 10, 11, and 12; and (4) whether, in any event, NFO's damage evidence was so conjectural and speculative as to be inadmissible." 510 F.Supp. at 435.

[6] Both those questions are again presented as issues after remand. Consistent with our long held view that cases should be decided on the merits rather than on procedural grounds, we have concluded that our determination of the question of Nathan's credibility moots the necessity of ruling the preclusion question. It is therefore

ORDERED that defendants' various motions to preclude and to strike the testimony of NFO's expert witness Nathan should be and are hereby denied as moot.

II.

The question of whether NFO's lost market penetration damage theories may be said to be based on credible evidence must be viewed in light of NFO's recognition at trial that Nathan's testimony was presented as an "economic analysis by an expert economist." NFO's Reply to Deft's Responses to Part XV of NFO's Prop. Findings of Fact, p. 214. That question must also be decided in light of NFO's recognition that the testimony and evidence introduced through Nathan which defendants seek to preclude "are the heart of NFO's damage case." We thus turn to the ultimate factual question of whether, on the merits, NFO's lost market penetration damage computation claim as primarily presented by Nathan's testimony and NFO's damage

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request into a preclusion trap." *Id.* at 21. We expressly reject NFO's contention as being totally unsupported by a fair reading of the record.

exhibits adduced during the course of that testimony can be said to constitute "a just and reasonable estimate of the damage based on relevant evidence" or whether an award based on such evidence would, on the facts, be based "on speculation or guesswork." *Bigelow, supra,* 327 U.S. at 264, 66 S.Ct. at 579.

Our detailed examination of NFO's replies to defendants' original responses to NFO's proposed lost market penetration findings of fact put into appropriate focus the respective positions taken by the parties in regard to the factual issues presented by the evidence adduced by both sides in connection with the two methods that NFO has proposed in regard to how NFO's alleged lost market penetration damages may be calculated.

We noted in an earlier part of our opinion that NFO P.F. 2264 proposes that we make the key finding, in accordance with Nathan's cited testimony, that "[t]he penetration (in terms of volume of milk pooled) achieved by NFO in Federal Milk Market Order 68 in 1973 (10.5%) is an appropriate measure of the minimum penetration which NFO would be expected to have made, with comparable effort, in comparable markets, but for the conduct of the defendants described in F. 128-340, 469-2017." We have also noted that NFO P.F. 2266, again in reliance upon Nathan's testimony, proposes that we make the key finding of fact that "Federal Milk Market Orders 30, 60, 61, 62, 64, 65, 73, 106 and 126 are comparable to Federal Milk Market Order 68."

Defendants argue in regard to NFO P.F. 2264, in reliance upon Babb's testimony that NFO's attempted use of Old Order 68 as a test market was neither appropriate nor proper. Defendants also argue, quite independent of Babb's testimony, that no factual basis was ever established by NFO which would entitle it to use Order 68 as a test market. Defendants pointed out that Nathan had at one time dropped consideration of any test market theory in accordance with instructions he received from NFO's coun-

sel and argue that Nathan thereafter used Old Order 68 solely because that order had been selected by NFO counsel. NFO, in its turn, attacks the credibility of Babb's testimony and argues that Nathan's testimony should be accepted. In regard to NFO P.F. 2266, defendants again rely upon Babb's testimony to support their factual arguments that the federal orders selected by NFO were not in fact comparable to Old Order 68; that there was no credible evidence to establish comparability; and that it may not properly be assumed that the various individual federal market orders are to be considered as economic markets for the purpose of predicting market penetration. Defendants also argue that no proper foundation had been established for Nathan's testimony in that regard.

Acceptance of NFO's test market theory would require that this Court make the factual findings as proposed in NFO's P.F. 2275 and 2276. NFO P.F. 2275, based primarily on NFO Exhibit 1225 and Nathan's testimony in regard to the exhibit, proposes that this Court find that "[i]t took three years from the time NFO entered Federal Milk Market Order 68 for it to obtain an annual 10.5% share of all the milk pooled on that order." NFO P.F. 2276-2285 proposed that we find the figures set out on NFO Exhibit 1016 and Nathan's testimony in regard to that exhibit as NFO's "actual" penetration.

The pattern of defendants' arguments in opposition to NFO's market share method proposed findings of fact follows the same general pattern as defendants' factual arguments presented in opposition to NFO's test market (10.5%) method proposed findings of fact. Defendants' arguments in opposition to those NFO proposed findings are based, in part, on Babb's testimony that it was a myth to suggest that NFO, or any milk marketing organization, would achieve some mature market share which, when reached, would be maintained over any specific period of time; his testimony that Nathan's definition of a "major" as a marketing organization having a 5% or more share of a particular federal

order was arbitrary and capricious; and his testimony that Nathan's acceptance of the assumption that NFO would achieve a uniform growth rate of 33⅓% in each of the orders selected by NFO in a three-year period was incredible.

Defendants further argued in opposition to NFO's proposed damage findings of fact that the assumptions relied upon by Nathan with respect to NFO's capabilities and its efforts had not been established by the trial record and that his testimony and the data contained in NFO Exhibit Nos. 1014(a), 1015, 1017, 1019 and 1020 were based on conjecture and speculation.

We believe it appropriate to state in substantial detail the reasons why we reject NFO's effort to bootstrap its damage exhibits, one upon another, and its attempt to have its only expert witness bootstrap one assumption upon another. NFO's alleged loss of membership dues and checkoff fees must obviously rest upon a finding, supported by the greater weight of the credible evidence rather than speculation and conjecture, that NFO, in fact, lost members during the relevant periods of time covered by NFO's damage claims. We therefore turn to a specific group of NFO's proposed findings of fact to illustrate in detail why we reject other similar bootstrap efforts on the part of NFO.

III.

The section of NFO's proposed findings of fact entitled "Membership Dues Lost by NFO" contained a subheading entitled "Number of Producers Pooled by NFO." Paragraphs 2359 through 2378 of the finding proposed under that subhead relied solely on NFO Exhibit Nos. 1023, 1025 through 1034 and the testimony given by Nathan in regard to those exhibits.

NFO Exhibit No. 1023 was entitled "Estimated active NFO members among producers pooled on indicated federal milk marketing orders by state of source, December 1969." The key column of that exhibit incorporated the percentage

figures derived from NFO Exhibit No. 1022 which was entitled "NFO membership factor—estimated active NFO members as percentage of farmers in indicated states." NFO Exhibit Nos. 1025 through 1034 reflected NFO's proportion of alleged losses of membership dues for the ten "damage" market orders. Each of those exhibits were based on NFO Exhibit No. 1024 entitled "Estimated number of producers who would have been pooled by NFO."

Each of NFO Exhibit Nos. 1025 through 1034, in the column entitled "NFO membership base," reflected that NFO was also relying on NFO Exhibit 1023, which purported to estimate NFO's active members who were pooled on ten "damage" orders, to support its assumption that the "NFO membership base" as of December 1969 would be exactly the same NFO membership base for each year stated on each exhibit, all of which contained projections through the year 1980.

Defendants' response to NFO's proposed paragraphs 2359 through 2378 denied that the figures set forth in those exhibits were accurate and that NFO's series of proposed findings contained in those paragraphs constituted sheer speculation and conjecture without any foundation. Defendants directed general attention to the various assumptions that NFO had provided Nathan and particular attention to the assumption that market conditions would not change over a period of time. Specific attention was directed to Babb's testimony (Tr. 14,444-45) in regard to the changes that should be expected in regard to the number of producers in a particular market. The testimony of Babb cited by defendants was as follows:

> Q . . . Are you aware that NFO has utilized certain assumptions as to its efforts and capabilities to penetrate the Midwest Federal Milk Marketing Orders as a major participant based on its membership base experience in other commodities, et cetera, that we discussed previously?
>
> A Yes.

Q In your opinion does the use of these assumptions as to capability and effort constitute a satisfactory basis for predicting or projecting NFO's performance as a major participant in the Federal Milk Marketing Orders in the Midwest?

A No, I wouldn't consider some of the assumptions sufficient in and of themselves. I would really want to know more about the assumptions and whether or not the assumptions fitted reality.

For example, one of the assumptions involving their membership base being constant from 1970, that is, the number of producers in the membership base being constant between 1970 and 1983, or the number of producers being the same after 1977 through 1980.

That assumption I think is contrary to fact, at least for the period 1970 through 1977, and further I expect that there will be declines in producers' numbers on through 1982.

NFO attempted to counter defendants' argument by stating that "Babb did not state that the number of Grade A dairy farmers was declining." (P. 270 of NFO replies to Defendants' response to NFO's proposed findings of fact). NFO then quoted some data from the Federal Milk Order Market Statistics, Annual Summary for the Years 1970, 1974, and 1975 in regard to Orders 30, 60, 65, 68, and 126 and contended that "the data indicate that between 1970 and 1975 (1974 for Order 126) the average number of producers in all ten damage markets increased 1,279." NFO accordingly argued that "NFO's damages are [thus] understated to the extent that NFO computed its percentage share from a static rather than an expanding universe of producers." (*Id.* at p. 271).

We find that NFO's assumption that the number of producers in its NFO's assumed membership base would remain constant between 1970 and 1983 is, to use and accept Babb's language "contrary to fact." (Tr. 14,445). We are satisfied by our examination of the available data in the

record that there has been a substantial and steady decline in the number of dairy farmers in the United States since the peak period of 1961. We further find that the decline in the number of producers that commenced in 1962 continued during the relevant periods of time involved in this case and that Babb's testimony that "there will be declines in producers' numbers on through 1982" (Tr. 14,445) must be accepted.

Although NFO's Exhibit No. 1024 indicated that producer figures used on that exhibit were those reported in "Federal Milk Order Market Statistics, Annual Summary for the years 1970-1976 and those contained in the monthly issue for August 1977," NFO did not make any reference to the 1977 figures to support its argument that there was an "expanding universe of producers." Indeed, NFO simply used the monthly average number of producers reported for the years 1970 and 1975 (1974 figures were used for Order 126) for five market orders it selected to support its argument.

Because NFO Exhibit No. 1024 suggests that NFO, in fact, considered the Department of Agriculture's 1977 data it should have been apparent to NFO that three of the market orders it selected, Minnesota-St. Paul (former Order 68), Minnesota-North Dakota (former Order 60), and North Texas (former Order 126), were no longer in existence in 1977. Indeed, NFO Exhibit No. 1016 establishes that NFO knew that Minneapolis-St. Paul (old Order 68), Minnesota-North Dakota (old Order 60), together with S.E. Minnesota-N. Iowa (old Order 61), were all merged into the new and large Upper Midwest Order No. 68, effective June 1, 1976. That exhibit also shows that NFO knew North Texas (old Order 126) had been merged into a new and large Texas Order 126, effective July 1, 1975. It must be noted that NFO did not mention what was happening to the number of producers in S.E. Minnesota-Northern Iowa (Order 61) during the 1969 to 1975 period of time that data is available for that alleged damage market. NFO Exhibits Nos. 1217, T.

7, 8; 1219, T. 7; 1487, T. 7; 1487, T. 6, 7, show that the number of producers in old Order 61 was as follows: 1969—1451; 1970—1048; 1971—910; 1972—919; 1973—818; 1974—720; and 1975—703. [The figures are for October of each year].

Those figures obviously do not support NFO's "expanding universe of producers" argument. Indeed, those figures establish that very substantial changes were taking place in regard to the pattern of milk supply and the number of producers in the geographic area covered by old Order 61. Old Order 61, of course, was located immediately south of old Order 68 and was a very short distance from the Twin Cities of Minneapolis and St. Paul.

When the new Upper Midwest Order 68 was established in 1976, not only were old orders Minneapolis-St. Paul, Minnesota-North Dakota, and S.E. Minnesota-N. Iowa included in the new Upper Midwest Order, Duluth-Superior was also merged into that new order. The new Upper Midwest order also included a large block of counties located in the northwest part of Wisconsin and a large block of counties in Minnesota that had not theretofore been included in any market order.

The fact that the new Upper Midwest order was created in 1976 to cover the State of Minnesota (except four counties in the southeast portion of that state), the northwest quarter of Wisconsin, together with substantial portions of the states of North Dakota (16 of that State's eastern tier of counties), South Dakota (8 northeastern counties) and Iowa (6 northern tier of counties) must be given appropriate consideration in the determination of whether one year's experience on the old Minneapolis-St. Paul Market Order 68 may properly be considered as a "test market".

When the comparable month of October 1970 is compared to the comparable month of October 1977, it is apparent that in the number of producers in two other market orders selected by NFO to support its "expanding universe" argu-

ment, in fact, followed the pattern of decline in accordance with Babb's testimony.

The following table includes the average figures used by NFO in its argument, and shows the October 1970 and October 1977 figures in the only two market orders, Chicago Regional (Order 30) and Nebraska-Western Iowa (Order 65), where comparable 1970 and 1977 figures are available. [The October 1970 figures are from NFO Exh. No. 1217, Table 8 and the October 1977 figures are from NFO Exhibit No. 1742, Table 4].

NUMBER OF PRODUCERS

Marketing Area	Average 1970*	October 1970	October 1977	Decline 1970-1977
Chicago Regional (Order 30)	16,888	16,927	16,673	252
Nebraska-N. Iowa (Order 65)	1,756	1,787	1,548	239

* The figures used in this column were the figures used by NFO to support its "expanding universe" argument.

The decline in the number of producers in the only two market orders for which comparable 1970 and 1977 figures are available must be considered in light of the fact that the average daily deliveries of milk per pound per producer steadily increased during the seven-year period from 1970 to 1977. The average daily delivery per producer increased in the Chicago Regional Order 30 from 1,150 pounds in October 1970 to 1,503 pounds in October 1977. The increase in Nebraska-Western Iowa Order 65 was from 1,323 pounds in October 1970 to 1,773 pounds in October 1977. See NFO Exhibit No. 1217, Table 10, for the October 1970 figures and NFO Exhibit No. 1742, Table 4, for the October 1977 figures.

A more comprehensive view of the changing pattern in the supply of milk from dairy farm producers to federal market orders and the decline in the number of those producers may be obtained by looking at the national picture and the portion of NFO's alleged damage orders that have not been merged with other orders during the period of time that data are available from the record in this case.

Appropriate consideration of that data is directly related to whether NFO's proposed findings of fact which are based on the data set forth on NFO's various exhibits and Nathan's testimony in regard to that data, all of which purport to estimate and project NFO's membership factor, to estimate the number of NFO's active members who purportedly would have marketed their milk through NFO, and to calculate whether NFO's alleged loss of membership dues on the ten "damage" orders should be accepted or rejected. We therefore turn to the national and regional data.

Table 2, page 9, of The Federal Milk Order Market Statistics: Annual Summary for 1975 (NFO Exhibit No. 1489) is entitled Measures of Growth in Federal milk order markets, 1947-75. Similar data for the months of October 1976 and October 1977 is reported in Federal Milk Order Market Statistics: October 1977 Summary (NFO Exhibit No. 1742).

The following table sets forth the national data relating to the number of markets, the number of producers, and the daily deliveries of pounds of milk made by the producers that appears on Table 2. The data for 1947 is set forth to show the first year covered by Table 2. The data for 1961 is stated because that year reflected the greatest number of producers for any year between 1947 and 1975. The years 1969 through 1975 are from Table 2. The data for October 1976 and October 1977 are from Table 4 of the NFO Exhibit No. 1742.

NATIONAL MARKETS

Year	Number of Markets	Number of Producers	Producer Deliveries	Daily Deliveries per Producer
	Number	Number	Million Lbs.	Pounds
1947	29	135,830	14,980	302
1961	81	192,947	48,803	704
1969	67	144,275	61,026	1,164
1970	62	143,411	65,104	1,244
1971	62	141,347	67,872	1,316
1972	62	136,881	68,719	1,372
1973	61	131,565	66,229	1,386
1974	56	126,094	67,778	1,473
1975	56	124,540	69,251	1,523
Oct. 1976	50	124,329	*	1,578
Oct. 1977	42	121,767	*	1,652

*Similar data not reported in NFO Exhibit No. 1742.

The above table makes clear that the number of milk order markets have declined over the years, that the number of producers has steadily and sharply declined from the top number of 192,947 in 1961 to 121,767 in October 1977 and that the volume of milk has increased because the daily deliveries of the pounds of milk per producer have dramatically increased over the years.

The steady consolidation of the various milk order markets from the 1962 high of 83 (two more than in 1961) to only 42 in October 1977 makes it difficult to set forth the dates for any particular market order. The Department of Agriculture, however, has established various groups of market orders and the Western Group and the Southern Group of the West North Central area remained the same for the years 1969 to 1977.

The Western Group of markets includes (1) Michigan Upper Peninsula (Order 44), (2) Chicago Regional (Order 30), (3) Louisville, Lexington, Evansville (Order 46), (4) Indiana (Order 49), (5) Southern Illinois (Order 32), and (6) Central Illinois (Order 50). The geographic area covered by those market orders includes the Upper Peninsula of Michigan, Wisconsin (except the northwest portion of that state), substantially all of Illinois and Indiana and the central portion of Kentucky.

The following table shows that the number of producers declined in a manner consistent with the national pattern. The number of pounds delivered daily per producer likewise increased, consistent with the national pattern. [The source of this data is stated in the final column of the table; the daily delivery data is reported for Order 30.]

WESTERN GROUP OF MARKETS

October of Year	Number of Markets	Number of Producers	Daily Deliveries Pounds Per Producer	NFO Exhibit Nos.—Tables
1969	67	28,094	1,046	1217, T. 7, 9
1970	62	27,634	1,150	1217, T. 8, 10
1971	62	27,087	1,168	1218, T. 7, 9
1972	62	27,415	1,169	1219, T. 7, 9
1973	61	26,282	1,156	1487, T. 7, 9
1974	56	26,368	1,215	1488, T. 7, 9
1975	56	27,104	1,260	1489, T. 7, 9
1976	50	26,044	1,425	1742, T. 4
1977	42	24,599	1,503	1742, T. 4

The Southern Group of the West North Central Group of Markets includes (1) St. Louis-Ozarks (Order 62), (2) Kansas City (Order 64), (3) Neosho Valley (Order 71), and (4) Wichita (Order 73). The geographic area covered by those markets includes substantially all of Missouri and Kansas

(except the four northwest counties) and four counties located in the northwest corner of Arkansas. A substantial number of counties in Missouri and a few counties in Kansas are not regulated under any market order.

The following table again shows that the pattern of decline in Missouri and Kansas was consistent with the national decline and that the increase in the number of pounds of milk delivered per producer was consistent with the national pattern. [The source of the data is stated in the final column of the table; the daily delivery data is reported for St. Louis-Ozark Order 64].

SOUTHERN GROUP OF
WEST NORTH CENTRAL MARKETS

October of Year	Number of Markets	Number of Producers	Daily Deliveries Pounds Per Producer	NFO Exhibit Nos.—Tables
1969	67	6,764	1,056	1217, T. 7, 9
1970	62	6,271	1,157	1217, T. 8, 10
1971	62	6,107	1,278	1218, T. 7, 9
1972	62	6,035	1,383	1219, T. 7, 9
1973	61	5,878	1,283	1487, T. 7, 9
1974	56	5,519	1,421	1488, T. 7, 9
1975	56	5,272	1,426	1489, T. 7, 9
1976	50	5,162	1,551	1742, T. 4
1977	42	5,088	1,548	1742, T. 4

The data reported by the Department of Agriculture that we have set forth in the above tables support our determination that Babb's testimony in regard to the decline in the number of producers must be accepted. We accordingly find that the assumption given Nathan by NFO counsel is not

supported by the record. We expressly find that NFO's notion that it could compute its claimed "percentage share from a static . . . universe of producers" is untenable.

We add a final word in regard to the changing milk supply patterns for Federal order markets. The fact that the changes in the supply pattern has been substantial over the years must be taken into consideration in determining whether damage claims that are based on assumptions that no substantial changes have taken place in the past and that no substantial changes will occur in the future should be accepted.

The Department of Agriculture's publication, Sources of Milk for Federal Order Markets by State and County: AMS-565 (1976), page 3, (NFO Exhibit 1478), contains a Historical Summary for the years 1957 to 1974. The first table included in that historical summary reflects the national decline in the number of producers from 182,551 in 1957 to 126,919 in 1974. The summary noted, however, that although the number of markets, like the number of producers, decreased from 1957 to 1974, the volume of milk received nevertheless increased. The summary stated that the delivery of 33.5 billion pounds of milk to 68 market orders in 1957 increased to 67.8 billion pounds of milk to 61 market orders in 1974. The historical summary then stated:

> "A closer look at total marketings and deliveries to Federal orders by producers in the leading milk producing States provides further insight into the changing milk supply patterns for Federal order markets. These States are ranked in two ways: Rank I, according to deliveries to Federal orders; and Rank II, according to total milk marketed in the United States.
>
> The following table shows the leading States delivering to Federal orders; deliveries to Federal orders as a percentage of total deliveries to Federal orders; and relationship to total United States marketings 1960, 1967, and 1974."

State	1960			1967			1974		
	Rank I	Percent of total delivs. to FO	Rank II	Rank I	Percent of total delivs. to FO	Rank II	Rank I	Percent of total delivs. to FO	Rank II
Wisc.	2	12.1	1	2	11.2	1	1	14.5	1
N.Y.	1	17.9	2	1	16.0	2	2	12.1	3
Penn.	3	8.5	5	3	8.5	5	3	8.5	5
Mich.	4	7.9	7	4	7.0	7	4	5.9	6
Ohio	5	6.8	6	5	6.7	8	5	5.5	7
Minn.	17	1.6	3	15	1.8	3	6	5.0	4
Tex.	7	3.6	12	6	4.0	11	7	4.8	9
Wash.	9	2.7	16	10	2.6	15	8	3.1	14
Ill.	6	4.0	8	8	3.4	9	9	2.8	11
Ind.	11	2.4	11	7	3.5	12	10	2.7	12
Vt.	8	3.6	14	9	3.0	16	12	2.6	15
Md.	10	2.5	19	13	2.4	19	16	2.1	20
Total Top 10		69.9			66.2			64.9	

The comment on the data reflected in the table prepared to reflect the "changing milk supply patterns for Federal market order markets" stated that "[o]ver the period 1960-1974, the order of the top 10 States delivering milk to Federal orders has changed" and added that "[n]otably, Minnesota has jumped from 17th to 6th." The historical summary suggests that the notable jump of Minnesota from 17th rank in 1960 and from its 15th rank in 1967 to 6th rank in 1974 does not support the selection of Order 68 as a test market for any purpose.

IV.

All parties' recognized at trial that the damage evidence adduced by NFO and that adduced by the defendants was in sharp conflict. The arguments presented in the voluminous post-remand briefs establishes that NFO's lost market penetration damage theories cannot be said to be supported by adequate substantial evidence unless this Court is able to accept Nathan as a credible witness. For we believe it to be obvious that NFO's alleged lost market penetration damage theories cannot be said to be supported by sufficient evidence unless the evidence adduced by NFO through Nathan is found to be credible under all of the circumstances of the case.

The ultimate factual question presented is not whether we determine that Babb's testimony is more credible and is more persuasive than that given by Nathan. The decisive question is whether Nathan's testimony and the reasons given by him in support of his opinions can be said to be sufficiently credible to support a determination that NFO has carried the burden of proving by a greater weight of credible evidence that the damage theories presented by Nathan and by the NFO damage exhibits adduced during his testimony established a fair and reasonable method of estimating NFO's alleged lost market penetration damages. We find that question must be answered in the negative.

[7] In cases tried by a jury, the trier of fact is instructed to consider and weigh the testimony and to consider the reasons given by the expert in support of the opinion. The trier of the fact is instructed that if it is concluded that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, the trier of the fact may disregard the opinion entirely.[31]

[8] We believe that the standards applicable to the trier of facts in a jury case are equally applicable to the trier of the facts in a nonjury case. Nathan's opinions and reasons he gave in support of those opinions necessarily rested in large part upon a substantial number of assumptions given him by NFO counsel. The Economic Analysis of Damages prepared by Professors Dahl and Hammond and Manring, an associate with Nathan's firm, (AMPI Exhibit 5475, p.

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[31]This Court, before it knew whether the case would be tried with or without a jury, attempted to require that all expert witnesses, in accordance with Rule 705 of the Federal Rules of Evidence, make a prior disclosure of all underlying facts and data so that the reasons upon which the expert witnesses would base their opinions would be revealed before trial. It cannot fairly be said that the prior disclosure of the underlying facts and data upon which Nathan's opinions were based were made in a manner that satisfied the obvious objective of Rule 705.

57), in express reliance upon *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.1962), stated in its concluding paragraph the following: "The primary limitation on the market share theory is the fact that some or all of the computations involving the market share approach require plaintiff to make a certain number of factual assumptions regarding the ability to penetrate specific markets. Difficult problems arise with this theory when assumptions of this nature are unsupported."[32]

Unlike the district court in *Herman Schwabe v. United Shoe Machinery Corp.*, we elected not to preclude Nathan as an expert witness. Nor have we ordered that his testimony be stricken. We are compelled to find, however, that Nathan's testimony and NFO's damage exhibits adduced in connection therewith cannot be accepted as credible under all the circumstances of this case. We therefore reject NFO's proposed findings of fact submitted in support of NFO's lost market penetration damage theories because, in the final analysis, those proposed findings of fact are fundamentally dependent upon the credibility of Nathan's testimony.

[9] We therefore find and conclude that a just and reasonable estimate of NFO's alleged lost market penetration damages cannot be made on any credible relevant data adduced by NFO and that any award of damages based on such a theory would necessarily be based on speculation and conjecture. It is accordingly

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[32]*Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, in an opinion written by Judge Friendly, presented the question of whether the district court had properly excluded expert testimony as to damages and various exhibits tendered in connection therewith. The Second Circuit discussed the familiar Supreme Court cases, including but not limited to *Bigelow*, examined the assumptions upon which the proffered expert testimony was based and concluded that the evidence offered by the plaintiff was insufficient to warrant submission of the damage issues to the jury.

ORDERED that the portion of NFO's motion for damages under which NFO seeks to recover lost market penetration damages should be and the same is hereby denied.

RESOLUTION OF QUESTIONS LEFT OPEN BY COURT OF APPEALS

March 1971 Beatrice Cutoff

Although the Court of Appeals definitely held that NFO, the corporation, could not "recover its asserted 'price reduction damages' ", 687 F.2d at 1208, that Court nevertheless stated that the "price reduction issue may be relevant to NFO's damages in that, by virtue of selling at lower prices, NFO may have lost members or, in turn, marketing volume." (*Id.* at 1208). The Court of Appeals further stated generally that all arguments concerning "NFO's right to recover membership dues and checkoff fees . . . largely raise factual questions for the district court. . . ." (*Id.* at 1209).

NFO recognized in its brief in support of its motion for damages that the Court of Appeals had expressly held that NFO could not recover for any price reduction damages. That brief directed attention to the motion that had been filed to have the "directly injured individual NFO dairy farmer" certified as a class "for purposes of collecting and distributing these damages."

NFO's brief in support of its motion for damages, however, contains a number of arguments much broader than a claim for price reduction damage. For example, NFO stated in regard to the March 1971 Beatrice cutoff that "[t]he three-month time frame simply reflects the fact that thereafter the producers, losing hope that the lost market would ever be replaced, *were driven out of the NFO program.*" (Emphasis ours). (Brief in Supp. of Mot. at 38) NFO also argued "[t]he defendants' conspiracy reduced the volume of milk NFO was able to market, *thereby reducing the corporation's*

checkoff fees and membership dues revenues." (Emphasis ours). (*Id.* at 29).

Although NFO made little effort to develop the arguments just stated, we believe the Court of Appeals intended that this Court make an appropriate inquiry as to whether the record could be said to support a claim that, for example, as a result of the March 1971 Beatrice cutoff, NFO dairy farmers were, in fact, "driven out of the NFO program," with the result that NFO must have "lost fees and dues from those who stopped marketing through NFO," to use the Court of Appeals' words, 687 F.2d at 1209. Accordingly, we make the inquiry we believe was mandated by the Court of Appeals in regard to the dues and fees aspect of the price reduction claims made by NFO during the trial of the case.

NFO cited three pages (pp. 2595-96, and 3157) of the testimony of Scott to support its specific argument that during the three-month period of April, May and June 1971 following the Beatrice cutoff a substantial number of NFO producers "were driven out of the NFO program." (*Id.* at 38).

It is true that Scott testified on direct examination on pages 2595-96 of the transcript as follows:

> Q. What happened to the program after the cutoff at Beatrice? . . .
>
> A. Our producers were very disillusioned, those that had requested Texas inspection, and those that we had anticipated coming with us did not do so. Our pay prices fell in the area. It was a general down feeling among all the producers.
>
> Q. Did you lose any producers?
>
> A. Yes, some.
>
> Q. How about at Mountain Grove?
>
> A. At one time in Mountain Grove we lost about half the producers that we had had.

* * * * *

Q. How about your organizing effort in Missouri after the cutoff at Beatrice, what kind of success were you meeting with?

A. We had very little success in getting any additional producers to come on and ship with NFO.

Scott, however, had earlier made clear on page 2582 of his direct examination that the volume of NFO milk that had gone to Beatrice-Fort Worth during February and March of 1971 simply went to other buyers after the Beatrice cutoff in March 1971. He there testified on direct examination as follows:

Q How long did Beatrice continue buying NFO milk at Fort Worth?

A Until about March, 1971.

Q What happened then?

A They ceased buying milk from the NFO.

* * * * *

Q Well, when you lost the Beatrice account, what did you do with the milk?

A Most of the milk went to cheese plants in the Southwestern Missouri area. There were some that went to Marigold in Texas, but most of it went to the cheese plants.[33]

On cross-examination Scott testified on page 2728 as follows:

Q (By Mr. Leonard) Mr. Scott, can you tell the Court

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[33]The names of the various cheese plants were stated on pages 2583-84 of the transcript which located the cheese plants in West Plains, Branson and Greenfield, Missouri and a cheese plant in Salem, Arkansas. He also testified that some milk was sent to Marigold in the Dallas-Fort Worth area. See also pages 3139, 3145, and 3147-48 for additional testimony in regard to where the milk went after the March 1971 Beatrice cutoff.

as you sit here today of anyway that NFO, Inc. did not receive as much income after Boswell ceased receiving the milk as it had before?

A As long as the volumes remained the same, the check-off to NFO would have been the same.

In specific regard to whether there is any decrease in the number of NFO producers in the three-month period following the Beatrice cutoff, Scott testified as follows:

Q And of your own knowledge, you know that after the Boswell relationship terminated, the number of producers did not decrease that were shipping to the three reloads in the month of April 1971, did it?

A As best I can recall, in April they did not decrease.

Q In May 1971 the number of producers shipping to the three reloads did not decrease, did it?

A As far as I can recall, it did not. . . .

Q In the month of June 1971 the number of producers shipping to the three reloads did not decrease, did it?

A I don't know. I just don't recall.

Q The records would show, wouldn't they?

A Yes.

(Tr. at 2728, 2729).

Scott also testified on pages 3159-60 of his cross-examination as follows:

Q At this time or at any time were you ever able to identify any producers who had been marketing through the NFO Jeff City, Mountain Grove, Springfield Reloads who you lost because of a lower pay price?

A I cannot.

The only records which would have shown whether NFO producers were "driven out of the NFO program" were the

meager hauling records of Whitmore Transport Co. (NFO Exhibit 1622).

We have prepared the following table from pages 160,071 to 160,091 of that exhibit in order to show that Whitmore hauled a great deal more milk to and from the three NFO reload stations in Southwest Missouri in the months of April, May, and June 1971 than Whitmore had hauled in March of that year.

TABLE SHOWING POUNDS OF MILK OF NFO PRODUCERS HAULED BY WHITMORE TRANSPORT CO.

1971	Farm Hauling	Over Road Hauling	Total Hauling
March	1,791,136	3,103,714	4,894,850
April	1,864,645	5,045,027	6,909,672
May	1,969,557	5,449,164	7,418,721
June	1,773,018	5,100,003	6,873,021

[10] It is obvious from the only records kept by anyone that Scott's testimony cited by NFO to support its argument that NFO producers "were driven out of the NFO program" and that NFO's checkoff fees and membership dues revenue could have accordingly been reduced simply cannot be accepted as credible. Rather, the only contemporaneous records in evidence fully support his testimony on cross-examination that he could not identify a single NFO producer that left the NFO program after the March 1971 Beatrice cutoff. We so find.

We are therefore required to find that NFO did not lose any producers as a result of the Beatrice cutoff.

Chicago Order 30

NFO claimed at trial that it suffered price reduction damages in Chicago Order 30. Although NFO class claimants now seek to recover exactly the same price reduction damages claimed by NFO at trial, NFO nevertheless makes

substantially the same loss of dues and fees argument in regard to the Chicago Order 30 that it made in regard to the March 1971 Beatrice cutoff—namely that "[t]he defendants' conspiracy reduced the volume of milk NFO was able to market, thereby reducing the corporation's checkoff fees and membership dues revenues."

We discuss the Chicago Order 30 price reduction damage claim only in regard to that argument and the specific arguments made by NFO in regard to Chicago Order 30 to the effect that after Wanzer signed its CMPC supply contract, NFO was virtually foreclosed from selling any milk to any Chicago dairy except Kraml and that in regard to Kraml, NFO was either to sell at Kraml's terms or "dump the milk on the ground."

It is therefore necessary to determine from the record whether the volume of milk that NFO put through its reloads, first for sale to Wanzer and later, in large, but not in entire part, to Kraml, did in fact, reduce "the volume of milk NFO was able to market, thereby reducing the corporation's checkoff fees and membership dues revenues" as NFO contends in its argument.

We have already made a substantial number of findings of fact in regard to the Chicago market and how NFO shifted the total volume of milk that went through its reload stations from one buyer to another. The Court of Appeals in no way suggested that those findings of fact, most of which were virtually undisputed, were clearly erroneous. As a background for futher discussion we direct attention to the findings of fact we made after trial in regard to the Chicago market as set forth in 510 F.Supp. at 476 and following pages. We found then and we again find the facts in regard to Order 30 as stated in paragraphs 1136, 1170, 1174 to 1176, 1178, 1181, 1190, 1191, 1237, 1238, 1240, 1299, 1305, 1306, 1309, 1312, 1344, 1351, 1370, 1374, 1377, 1378, 1393, 1398, 1424, 1427, 1432, and 1434 of 510 F.Supp. at 476 and notes.

We particularly reiterate and quote our finding in paragraph 1375 which states that:

> 1375. Any Wisconsin Grade A milk that NFO did not deliver to Order 30 bottling plants, including Wanzer, was sold to Wisconsin manufacturing plants generally, at prices which returned more money per cwt. to the NFO dairy farmer member than if that milk had been sold to Wanzer.

Focusing again on the volume, rather than the price received for the NFO milk that went through NFO's Order 30 reloads, it should be noted that Avila, who was identified in NFO's June 30, 1975 Narrative Damage Statement as one of the witnesses who would testify in support of NFO's Chicago damage claim, testified at length in regard to Chicago Order 30.

Avila testified on redirect examination in regard to the total volume of milk NFO was marketing on Chicago Order 30 in the years 1971 and 1972 as follows:

> Q. How much milk were you marketing in Order 30 in 1971?
>
> A. Approximately 25 million pounds of milk per month.
>
> Q. So it would come to about 300 million pounds a year?
>
> A. Yes.
>
> Q. How about in 1972?
>
> A. It would have been in excess of 350 million pounds in 1972.

(Tr. 5396-97).

The Court, in an effort to determine the significance, if any, of a rumor reported in the Chicago Administrator's April 26, 1971 Report (CMPC Exh. 343) to the effect that "Wanzer was going to shut them [NFO] completely," and the significance, if any, of the 1971 CMPC-Wanzer contract, made particular inquiry of Avila in regard to what was

happening to the volume of milk NFO was sending to Chicago from its reload stations in the years 1971 and 1972. The Court asked the following questions and received the following answers from the witness:

> THE COURT: May I make inquiry . . . NFO Exhibit 112 shows that NFO supplied Wanzer with a greater total volume of milk in August, 1971 than at any other time during that year, namely, 6,936,066 pounds, all of which was classified as Class II. The very next month, however, NFO supplied Wanzer only 541,380 pounds, which was classified as Class I. I simply cannot believe that NFO had somehow lost control of over six million pounds of milk in a single month.
>
> THE WITNESS: We didn't, Your Honor.
>
> THE COURT: My question is, where did that six million pounds of milk that had gone to Wanzer in August, 1971, the equivalent quantity or about that in September, 1971, was that sold to cheese plants in Wisconsin or had you begun your movement of Wisconsin milk to Ponca City at that time?
>
> THE WITNESS: No. We negotiated the Kraml contract effective in September, and we moved the milk from Wanzer to Kraml to meet our contractual commitments with Kraml. That is where that volume was.

(Tr. 5578).

Consideration of where the volume of milk from NFO's Wisconsin reload stations and its Harvard, Illinois reload station went must also take into account that a substantial volume of NFO milk that went through those reloads never went to a Chicago handler. AMPI Exhibit No. 5150, for example, corroborated Avila's testimony in regard to total volume of NFO milk that went to Wanzer, Kraml and other Chicago handlers. That exhibit also shows that the milk handled by some of the NFO reload stations was never sold to a Chicago handler.

AMPI Exhibit No. 5150 shows, for further example, that none of the milk from NFO's Taylor, Wisconsin reload went

to Chicago during the period from August 1970 through August 1972 and that all went to unregulated plants in Arcadia, Marshfield, Pigeon Falls, Wisconsin and Fredricksburg, Iowa. That exhibit also shows that during the same period of time some of the milk from NFO's Menasha, Wisconsin plant went to Wanzer and Kraml in Chicago and some went to unregulated plants in a number of small Wisconsin towns.

The part of the exhibit relating to NFO's Stoughton, Wisconsin reload corroborates Avila's testimony concerning the shift of NFO milk from Wanzer to Kraml beginning in September 1971. The Exhibit shows that from June 1970 through August 1971 practically all the milk from the Stoughton reload went to Wanzer.[34] The NFO milk from the Stoughton reload was shifted from Wanzer to Kraml beginning in September 1971. The exhibit shows that in April and May 1971, before any milk was sold to unregulated plants in June and July 1971, Wanzer purchased 3,301,000 pounds and 2,737,000 pounds, respectively, that went through the Stoughton reload.[35] The exhibit shows that as a result of the shift from Wanzer to Kraml, Kraml purchased 3,393,000 pounds of NFO milk that went through the Stoughton reload, an obvious increase in volume as compared to Wanzer's April, May, and August 1971 purchases of NFO milk that went through the Stoughton reload. It would be most unreasonable to infer that NFO could be losing dues and fees when the volume of milk being handled by it was increasing rather than decreasing.

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[34]In June 1971, 1,284,000 lbs. of Stoughton milk went to an unregulated plant in Wittenberg, Wisconsin and in July 1971, 1,284,000 lbs. of NFO milk went to an unregulated plant in Sherry, Wisconsin.

[35]The last shipment of NFO Stoughton milk to Wanzer was 2,257,000 lbs. in August, 1971.

AMPI Exhibit No. 5150 further shows that the entire volume of NFO milk that went through NFO's reloads at Sauk City, Tomah, Dickeyville, and Marathon, Wisconsin, was sold to unregulated plants in Wisconsin, except 2,224,000 pounds that went from Dickeyville to Borden in Lexington, Kentucky in September, October, and November, 1971.[36]

The pattern in regard to NFO's Harvard, Illinois reload was substantially the same as that stated in regard to the Stoughton reload; Wanzer purchased all NFO milk from August 1970 through August 1971 (except Harvard's July 1971 milk went to an unregulated plant in Brownsville, Wisconsin; 2,369,000 pounds of NFO milk went to Wanzer in August 1971, Kraml purchased 2,378,000 pounds of NFO milk in September 1971.[37]

The pattern in the NFO Hartford, Wisconsin reload, probably because of the complicated NCDC history, was somewhat different from the NFO's other Wisconsin reload stations which were established under different circumstances. AMPI Exhibit No. 5150 establishes that Wanzer

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[36]AMPI Exhibit No. 5150 shows that no milk went through NFO's South Wayne, Wisconsin reload until February 1972, all milk that went through from February 1972 through August 1972 was purchased by Kraml, and that none was purchased by Wanzer.

[37]A substantial amount of NFO milk from the Harvard, Illinois reload was shifted back from Kraml to Wanzer in June, July, and August 1972. The shipments to Kraml from September 1971 through May 1972 and shift of the shipments back to Wanzer for June through August 1972 all exceeded 2,000,000 pounds of milk for each of those months, again in corroboration of Avila's testimony that the total volume of NFO's 1972 sales exceeded the total volume of NFO's 1971 sales.

purchased all NFO milk that went through Hartford from August 1970 through December 1970; that the entire volume of Hartford went to an unregulated plant in Wisconsin in January 1971; and that all February 1971 NFO milk went to Marietta, Ohio on Order 33. Wanzer made substantial purchases from May through July 1971 and later from March 1972 through August 1972. The Hartford reload milk was shifted to Kraml in September 1971 through November 1971 and Kraml also purchased Hartford's supply in January and February 1972.[38] The shift to Kraml in September 1971, of course, is consistent with the pattern of the other NFO reload stations and with Avila's testimony of where the total volume of NFO milk in Chicago went after the basic shift from Wanzer to Kraml.

There is additional information in the record which provides accurate data in regard to the number of NFO producers and the volume of milk pooled by those producers on Order 30. The record shows that NFO, in connection with other matters in issue, introduced various exhibits which reflected the Order 30 Market Administrator's Reports of Receipts and Utilization of NFO's reload stations located at Stoughton, Menasha, South Wayne, Taylor, and Slinger, Wisconsin and at Harvard, Illinois, all of which pooled milk on Order 30. Examination of the Market Administrator's reports for all the NFO reload stations in Wisconsin and the single reload station in Harvard, Illinois that pooled milk on Order 30 in 1972 through 1974 establishes that NFO did not lose any members during the period of time that reports are available. Reports for all five of NFO's reload stations for the months May, July, August, September, and November 1972; for the months of March and April 1973; and for

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[38]Hartford's April and August 1971 volume was sold to unregulated plants in Wisconsin; its December 1971 volume was sold to Sealtest Foods in Chattanooga, Tennessee on Order 90.

the months of February, March, and July 1974 were admitted in evidence in this case.[39]

Tabulation of data that appears on reports of all of NFO reloads that pooled milk on Order No. 30 gives an accurate factual picture in regard to whether NFO actually lost any producers and whether the volume of milk pooled by NFO on Order 30 was actually reduced during the years 1972 and 1974.[40]

Each of the Market Administrator's reports contains a statement of the number of farms from which NFO milk was received in each particular month. The following table sets forth the number of NFO producers for each reload station and the total number of NFO producers for each month stated:

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[39]Additional reports for the months of October, November, and December 1975 were also admitted in evidence. Those reports, however, included data from the NFO reloads at Taylor and Slinger, Wisconsin in addition to the data reported in regard to the five other NFO reloads and will, for that reason, be omitted from the table to be set forth in the text.

[40]The NFO exhibits which provide the information in the two tables that will be set out in the text are listed in the following table:

NFO EXHIBIT NUMBERS

DATES	HARTFORD	MENASHA	STOUGHTON	HARVARD	SO. WAYNE
May 1972	NFO 1299	NFO 1298	NFO 1301	NFO 1300	NFO 1297
July 1972	NFO 1234	NFO 1233	NFO 1236	NFO 1235	NFO 1232
Aug. 1972	NFO 1239	NFO 1238	NFO 1241	NFO 1240	NFO 1237
Sept. 1972	NFO 1244	NFO 1243	NFO 1246	NFO 1245	NFO 1242
Nov. 1972	NFO 1304	NFO 1303	NFO 1306	NFO 1305	NFO 1302
Mar. 1973	NFO 1249	NFO 1248	NFO 1251	NFO 1250	NFO 1247
Apr. 1973	NFO 1309	NFO 1308	NFO 1311	NFO 1310	NFO 1307
Feb. 1974	NFO 1255(a)	NFO 1253(a)	NFO 1256(a)	NFO 1254(a)	NFO 1252(a)
Mar. 1974	NFO 1259(a)	NFO 1258(a)	NFO 1261(a)	NFO 1260(b)	NFO 1257(a)
July 1974	NFO 1264(a)	NFO 1263(a)	NFO 1267(a)	NFO 1265(a) & 1266(a)	NFO 1262(a)

Table 1—Number of NFO Producers

DATES	HARTFORD	MENASHA	STOUGHTON	HARVARD	SO. WAYNE	TOTAL
May 1972	199	109	91	74	47	520
July 1972	190	113	94	74	56	527
Aug. 1972	188	109	94	74	57	522
Sept. 1972	188	107	94	74	57	520
Nov. 1972	186	120	93	74	57	530
Mar. 1973	137	172	92	70	105	576
Apr. 1973	135	171	93	66	105	570
Feb. 1974	134	168	93	61	99	555
Mar. 1974	134	163	92	61	94	544
July 1974	?	?	88	?	89	*

* The number of farms reported for the reloads at Harvard, Menasha, and Hartford are either illegible or reported in a confusing manner, hence the total number of NFO farms cannot be stated for July 1974. It should be noted, however, that the total volume of 25,262,999 pounds, which is legibly reported, reflects a volume consistent with the total number of farms reported for all the other months. (See Table 2).

Table 2 sets forth the total volume of milk received each month from each of the NFO reload stations and the total volume of milk received each month from all of NFO's reload stations:

Table 2—Volume of NFO Milk

DATES	HARTFORD	MENASHA	STOUGHTON	HARVARD	SO. WAYNE	TOTAL
May 1972	9,200,019	4,874,887	4,786,071	3,208,116	3,101,266	25,170,359
July 1972	8,633,621	4,966.110	4,729,318	3,410,806	3,507,848	25,247,703
Aug. 1972	7,915,715	4,627,453	4,381,543	3,153,307	3,272,721	23,350,739
Sept. 1972	7,334,354	4,382,918	3,868,985	2,837,374	3,032,545	21,456,176
Nov. 1972	6,912,941	4,159,927	3,361,225	2,470,530	2,705,170	19,609,793
Mar. 1973	6,419,916	7,055,384	4,337,772	2,809,598	5,005,980	25,628,650
Apr. 1973	6,431,062	7,157,650	4,428,514	2,777,467	5,251,716	26,046,409
Feb. 1974	5,661,475	6,219,054	3,708,889	2,254,759	4,442,518	22,286,695
Mar. 1974	6,580,682	6,934,467	4,296,318	2,581,744	4,735,308	25,128,519
July 1974	7,886,878	6,057,170	4,221,565	2,471,422	4,625,964	25,262,999

Analysis of the data set forth in both of the above tables establishes that NFO did not, in fact, lose any members during the months reflected by the reports of Order 30's Market Administrator.

[11] Consideration of our findings of fact made after trial and analysis of the evidence in regard to Chicago Order 30 as that evidence relates to any reduction in the number of NFO producers and the volume of NFO milk on that order establishes that NFO's factual argument that the "defendants' conspiracy reduced the volume of milk NFO was able to market, thereby reducing the corporation's checkoff fees and membership dues revenue" is untenable. We find that the greater weight of the credible evidence does not support such a finding.

For the reasons stated, it is

ORDERED that the remaining portion of NFO's motion for damages under which NFO seeks to recover on theories in addition to its lost market penetration damage claim should be and the same is hereby denied.

ISSUE NO.7—INJUNCTIVE RELIEF

I.

Issue No. 7 presents the question of to what, if any, injunctive relief NFO may be entitled under the circumstances of this case. That question was stated as follows in the next to the last paragraph of the Court of Appeals' opinion, 687 F.2d at 1210:

> The only other question relates to injunctive relief and the possible mootness effect of the Mid-Am and AMPI consent decrees. NFO is plainly entitled to an injunction against the kind of unlawful conduct identified here. The district court is, of course, free to consider

the extent to which the consent decrees provide NFO with sufficient, enforceable relief.[41]

NFO, after remand, therefore filed a motion for injunctive relief under Section 16 of the Clayton Act. Up to that point in this long litigation, NFO was more interested in obtaining legal rather than equitable relief. NFO's memorandum in support of its post-remand motion, placed primary reliance on *Paschall v. Kansas City Star Co.*, 695 F.2d 322 (8th Cir.1982), and argued that this Court is under duty to enter an injunction which would both prohibit a recurrence of past illegal activity and which would also eliminate what NFO contends were the consequences of that past activity.

[12] NFO attached a proposed form of injunction to its memorandum in support of its motion which it contends is justified and required by Section 16 of the Clayton Act. There is little dispute about the principles of equity that must be applied. We believe that the discussion of the Supreme Court cases in Part IV of *Kansas City Star I, supra*, 695 F.2d at 334-36, accurately states the principles to be applied in this case.[42]

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[41]The Court of Appeals made additional, but passing, reference to the consent decrees and to question of mootness that might be presented in connection with those decrees in 687 F.2d at 1181 n. 5; 1204 n. 38; 1205 n. 39; and 1206 n. 41.

[42]We do not believe that this Court of Appeals en banc decision in *Paschall v. Kansas City Star Co.*, 727 F.2d 692 (8th Cir.1984), *cert. denied*,——U.S.——, 105 S.Ct. 222, 83 L.Ed.2d 152, *reh. denied*,——U.S.——, 105 S.Ct. 406, 83 L.Ed.2d 340 (1985), which reversed the district court and accordingly vacated the injunction approved in *Kansas City Star I*, can be said to have any impact on what was said in the panel opinion in regard to the principles applicable to the formulation of appropriate equitable relief. Those principles, of course, must be applied to the particular factual circumstances of a given case.

Defendants' memorandum in opposition argued that no injunction was warranted for the reason that, on the facts, there is no evidence to support a factual finding that there is any impending or contemplated violation of the antitrust laws. Defendants further argue that the provisions of NFO's proposed injunction entirely duplicates the relief already granted in the AMPI and the Mid-Am consent decrees and that the consent decrees provide NFO with all the relief to which NFO may be entitled. Defendants point to *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261, 92 S.Ct. 885, 890, 31 L.Ed.2d 184 (1972), in which the Court observed that while the potential of multiple antitrust injunctions must be recognized, "the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one."

Defendants' opposition memorandum made a detailed analysis of NFO's proposed injunction and attached as Exhibit A to that memorandum a side-by-side comparison of the injunctive relief sought by NFO and the particular paragraphs already contained in the AMPI and Mid-Am consent decrees. Defendants accordingly argued that "the side-by-side analysis indicates, and as NFO has admitted, NFO's Memorandum at 7, the majority of the injunction provisions proposed by NFO have bound Mid-Am, AMPI/CMPC, as well as anyone acting in concert with them, since 1975 and 1977, respectively, and moot NFO's request for injunctive relief herein."[43] (Defendants' Memo. in Opp. at 5).

Defendants also filed an appendix to their opposition brief in which they proposed 141 proposed findings of fact on the injunctive relief question. We will discuss those proposed findings and additional proposed findings which

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[43]NFO conceded on page 7 of its memorandum in support of its motion that "[m]any of the provisions are based upon or derived from paragraphs of either the Mid-Am or AMPI decrees."

defendants filed at the time of oral argument in a later part of this opinion.

NFO's reply to defendants' argument contended that the consent decrees do not provide NFO with sufficient relief in that (a) the consent decrees are not binding on CMPC, (b) that the consent decrees do not provide sufficient relief as to AMPI and Mid-Am, (c) that, somehow, NFO has been *prohibited* from enforcing the consent decrees for the reason those decrees did not provide what NFO calls "enforceable" relief, and (d) that further equitable relief by way of an additional injunction is necessary because defendants are habitual antitrust violators.

NFO's reply memorandum made a detailed response to defendants duplication argument and contended that the provisions of its proposed injunction relating to the prohibition against asserting claims against purchasers (¶ II(1)); against discrimination, harassment and threats and those proposed in regard to contracts and hauling (¶ II(2) through (10)); those relating to membership termination (¶ III(a)); to mandatory purchasing of NFO milk by defendants' manufacturing facilities (¶ III(2)); to acquisitions (¶ III(3)); to CMPC surplus milk disposal (¶ III(4)); to block voting (¶ III(5)); and to document retention (¶ IV-3) should all be included in the equitable relief which NFO contends was mandated by the Court of Appeals' decision.

II.

We are satisfied that NFO's argument that it seeks to incorporate and duplicate many of the provisions in the consent decrees "in large part because there are substantial differences between the two decrees' prohibitions" (NFO original supporting brief, p. 7), and its argument that the consent decrees are not enforceable against CMPC,' its argument that the supplemental enforcement procedures contained in the consent decrees prohibits NFO from seeking enforcement of those decrees are all untenable.

III.

The question of whether sham litigation is prohibited by the consent decrees presents a close and difficult question in light of the Court of Appeals rejection of this Court's findings of fact in that regard and in light of the independent findings of fact made by the Court of Appeals in regard to that question. Defendants argued both in their opposition brief and at oral argument that the prohibitions contained in paragraphs IV(g) of the AMPI consent decree and VII(D) of the Mid-Am consent decree are broad enough to cover sham litigation.[44]

NFO contended, particularly in oral argument, that the Court of Appeals' independent findings of fact in regard to "sham litigation ... was a centerpiece of the Court of Appeals' decision" (Tr. of oral argument, p. 455), and argued that "[t]he consent decrees do not prohibit sham litigation [which was] a major practice that the Court of Appeals condemned." (*Id.* 450).

Defendants properly recognize that neither of the consent decrees "contain a *specific* provision addressed to the initiation or maintenance of sham litigation or threats of

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[44]Paragraph IV(g) of the AMPI consent decree provides that: "(g) Interfering or attempting to interfere with the exercise of the right of any processor to buy milk from a nonmember-producer at whatever prices, terms, or conditions said processor may chose, except that nothing herein shall limit defendant's rights under the Agricultural Fair Practices Act, 7 U.S.C. § 2301 *et seq.*;

Paragraph VII(D) of the Mid-Am consent decree provides: "(D) discriminating or threatening to discriminate against any buyer of milk on account of its actual or proposed purchase of milk from a competitor of defendant;

Provided, however, nothing in this Paragraph VII shall be construed to limit or affect the application of the antitrust laws to Milk Sales Agreements."

litigation against potential buyers." (Def's Supp. Appendix, p. 1. (Def's emphasis)).

[13] We are quite satisfied that if appropriate enforcement proceedings had been commenced for an alleged violation of paragraph IV(g) of the AMPI consent decree or paragraphs VII(D) of the Mid-Am consent decree based on an alleged factual claim that either AMPI or Mid-Am had instituted or was threatening to institute some sort of sham litigation after the entry of those decrees, that this Court would not have sustained a defense motion that those paragraphs were not broad enough to cover such a claim.

We do not believe, however, that the sham litigation question can be so easily determined. First, no one, in fact, ever made any claim that the consent decrees had, in fact, been violated by the alleged institution of sham litigation since the consent decrees were entered in 1975 and 1977. The question of how the question should be decided has never actually been presented.

Second, and much more important, we do not believe that a fair reading of the Court of Appeals' decision can fail to recognize the great emphasis that court placed on the sham litigation question. If that be true, and we believe that it is, then the question is whether this Court is under duty to accept the findings of fact made by the Court of Appeals and follow the views so emphatically stated in its decision.

At oral argument, which we heard after a careful study of the briefs filed by the parties, we expressed the tentative feeling that defendants' arguments that NFO was not entitled to any equitable relief whatever could not be sustained "unless you do something about the Court of Appeals' very direct statement that 'NFO is plainly entitled to an injunction against the kind of unlawful conduct identified here.' " We added "[n]ow, what would you say to the Court of Appeals if you get up there . . . and they said, 'What particular provision in any existing injunction covers conduct (a) identified here, which isn't even mentioned

generally in either of the other decrees.' " This Court has not found a satisfactory answer for that question.

While we are satisfied that it is most likely that this Court would have concluded that the consent decrees were broad enough to cover sham litigation had such a question been presented before the decision of the Court of Appeals, we have, with grave reservations of doubt, decided that the discharge of our duty to follow the decisions of our appellate courts requires that we conclude that the Court of Appeals implicitly directed this Court to find and conclude that NFO is entitled to an injunction that specifically prohibits sham litigation in the form as generally stated in paragraphs II(1) and II(2)(a) of its proposed injunction. We say "in the form as generally stated" because we are confident that much more direct language may be agreed upon. The injunction relief to be granted shall be limited to a prohibition against the institution of threatened sham litigation for the reasons above stated. We turn now to the reasons why no further equitable relief will be granted.

IV.

NFO's briefs in support of its motion for equitable relief and its briefs in reply to defendants' briefs in opposition are based primarily on its reading of the Court of Appeals' opinion and on legal, rather than factual arguments. NFO, of course, recognized that defendants "have filed scores of proposed factual findings and argued at length that the underlying factual record in this case, even apart from the consent decrees, shows NFO is entitled to no injunctive relief whatsoever." (NFO Reply Brief, p. 2). NFO's basic response to defendants' factual arguments was rhetorically stated as follows:

> Each of these arguments is frivolous at best. Defendants have completely ignored both the Eighth Circuit's binding holding that NFO is "plainly entitled to an injunction," *and* the Eighth Circuit's controlling decision in *Paschall v. Kansas City Star Co., supra.* Stripped

> of these fundamental infirmities, defendants' remaining contentions are reduced to a series of easily met quibbles concerning the specifics of NFO's proposed injunction.[45] (*Id.* at 3).

NFO departed from its general approach of reliance upon legal as distinguished from factual arguments in regard to particular findings of fact proposed by defendants in opposition to the provisions in NFO's proposed injunction that related to "required purchases." NFO properly recognized on page 8 of its most recently filed appendix that the defendants' proposed findings of fact 36 and 104-111 "essentially state that no evidence was adduced at trial that the defendants' acquisitions of propriety dairies and manufacturing plants displaced any NFO sales."

NFO argued that defendants were "wrong on their underlying facts" and directed attention to findings of fact made by this Court in regard to the acquisition and merger of (1) Five Star Dairyland with AMPI predecessor MPI in 1969, (2) the 1969 AMPI merger with Belle Plaine Dairy, (3) AMPI's 1969 acquisition of New Prague, (4) AMPI's acquisition of St. Charles Condensary Co., (5) AMPI's 1969 acquisition of Farmers Cooperative Creamery in Deer Creek, Minnesota, (6) AMPI's purchase of Grey Eagle Cooperative, (7) Mid-Am's 1970 merger with North Star in St. Paul and with North Star Dairy-Lakes Division, (8) AMPI's 1973 purchase of Theils Milk Products in Wisconsin, and (9) Mid-Am's 1969 purchase of Standard Milk and Major Cheese in Southwest Missouri.

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[45]See also NFO's introduction to its most recently filed appendix which contained NFO's responses to defendants' supplemental appendix which contained additional proposed findings. NFO there stated that "[t]he defendants raise no objections that can withstand examination, but instead loose a barrage of half-truths, distortions, and irrelevancies in a final desperate effort to fend off the sufficient, enforceable injunctive relief to which the Eighth Circuit has plainly held NFO entitled."

It is appropriate that we examine NFO's contention that defendants were wrong on the underlying facts set forth in their proposed findings of fact. For it is clear that NFO has, for the most part, cited and relied on the relatively small number of findings of fact made by this Court, many in modified form, in response to the NFO's proposed findings of fact as set forth in paragraphs 1478 to 1568 entitled "AMPI/Mid-Am northern mergers 1969-1970."

NFO's contention in regard to who is right and who is wrong in regard to the underlying facts—and for that matter, in regard to the findings of fact independently made by the Court of Appeals—must be considered in light of the Court of Appeals' conclusion that "we cannot say it was clearly erroneous for the district court to reject findings that the acquisitions, mergers and related milk pooling practices were part of an unlawful conspiracy." 687 F.2d at 1206.

The Court of Appeals also stated in regard to acquisitions and mergers that:

> In instances where acquisitions of independent dairies resulted in actual displacement of preexisting NFO sales, however, the district court, on remand, should consider whether such conduct following acquisition reflects an intent to block NFO rather than a legitimate business decision based upon price, quality or similar factors. Where post-acquisition terminations of NFO sales are found to be part of the scheme to eliminate NFO, such lost sales would form a basis for NFO's damage claim.

687 F.2d at 1206-07.

NFO elected not to attempt to adduce any additional evidence after remand in regard to whether any mergers or acquisitions may have resulted "in actual displacement of pre-existing NFO sales" than that adduced at trial. For NFO elected not to have the record reopened. The findings of fact made in regard to the particular mergers and acquisitions presently cited and relied upon by NFO did

very little more than recite the undisputed factual circumstances in regard to the dates upon which those mergers and acquisitions took place.

Who is right or wrong in regard to whether the underlying factual circumstances support NFO's claim for additional independent equitable relief in regard to mergers and required purchases must be viewed in light of the findings of fact proposed by NFO at trial which the Court of Appeals concluded had been properly rejected by this Court after trial. It is not necessary that we set forth all of NFO's proposed findings of fact that were rejected by this Court as shown in 510 F.Supp. at 487-89 in regard to Part VII, A, of NFO's proposed findings entitled AMPI-Mid-Am northern mergers, 1969-1970. We need set forth only the paragraphs of NFO's proposed findings of fact which relate directly to the mergers and acquisitions upon which NFO presently relies to support its argument that defendants are wrong in regard to the factual circumstances as proposed in defendants' post-remand proposed findings of fact.

The record in this case shows that the Court of Appeals approved our rejection of the following findings of fact which NFO proposed we find in regard to the mergers and acquisitions under discussion:

A. AMPI/MID-AM NORTHERN MERGERS, 1969-1970

1478. In early 1969, there were several hundred independent milk manufacturing plants in Minnesota, some operated by farmer cooperatives and some by independent entrepreneurs ("proprietaries"). [Rejected]

1479. AMPI, Mid-Am and ADI believed consolidation of manufacturing facilities in Minnesota was necessary to accomplish their objectives of controlling milk marketing in the Midwest. [Rejected]

1481. The management and officials of Mid-Am and AMPI worked together in their Northern Regions in their acquisition programs, procurement and marketing programs. [Rejected]

1482. One of the goals of AMPI and Mid-Am in their merger programs was to acquire plants with substantial numbers of farmer-suppliers who were NFO members. [Rejected]

1488. In January 1970, AMPI was overpaying its Northern Region producers at the rate of $500,000 per month. [Rejected]

1489. In 1969 and 1970, AMPI financed its Northern Region losses with profits from the MPI (Southern) Region. [Rejected]

1497. MPI's "game plan in getting Belle Plaine was to eventually get New Prague" (New Prague Dairy Products, Inc., a cooperative plant in New Prague, Minnesota). [Rejected]

1501. MPI acquired Belle Plaine, in part, to procure a large number of producers to be overpaid, thereby increasing economic pressure on competing cooperatives, threatening them with bankruptcy and facilitating their acquisition by MPI. [Rejected]

1502. Belle Plaine provided MPI with a "territorial base" to pressure competing cooperatives to merge with MPI. [Rejected]

1503. All competitors of Belle Plaine were eventually acquired by either AMPI, Mid-Am or Land O'Lakes. [Rejected]

1507. MPI could not accommodate all the Belle Plaine milk at its New Ulm plant but planned to use Belle Plaine's substantial volume of milk as "bait" in order to get other cooperatives to merge. [Rejected]

1512. MPI/AMPI used the Belle Plaine volume to get New Prague to merge with AMPI. [Rejected]

1513. AMPI's acquisition of New Prague was intended to, and did, "seriously set NFO back." [Rejected]

1524. The "primary objective" of the Deer Creek merger "was to exert pressure on North Star" (North Star Dairy, St. Paul, Minnesota). [Rejected]

1527. The "primary objective" of the Grey Eagle acquisition "was to exert pressure on North Star." [Rejected]

1536. Many feeder plants in the North Star system also joined Mid-Am shortly after the North Star merge. [Rejected]

1544. But for Benson's acquisition by Mid-Am, NFO would have been able to sell milk to the Benson Cooperative plant. [Rejected]

1552. But for the Mid-Am acquisition of Pure Milk Winsted, NFO would have been able to sell milk to the plant. [Rejected]

1567. AMPI's and Mid-Am's merger activities in Minnesota and western Wisconsin beginning in 1969 were intended to, and did, substantially limit competition in the purchase and sale of milk for manufacturing purposes in Minnesota. [Rejected]

1568. AMPI's and Mid-Am's merger activities in Minnesota and western Wisconsin were intended to, and did, limit NFO's ability to compete in the procurement and marketing of raw Grade A milk in Minnesota. [Rejected]

The findings of fact proposed by NFO in regard to Mid-Am's 1969 purchases of Major Cheese Company of Ozark, Missouri and Standard Milk Company of Aurora, Missouri were included in the section of NFO's proposed trial findings of fact entitled "Mid-Am mergers" (NFO P.F. 802-822). We set forth the specific findings which we rejected in regard to those acquisitions as shown in 510 F.Supp. at 478:

818. Mid-Am's acquisitions of the Major Cheese Company of Ozark, Missouri, and the Standard Milk Company of Aurora, Missouri, were intended to, and did, eliminate actual and potential competition for the procurement and sale of raw Grade A milk in southern and southwestern Missouri and Federal Order 62. [Rejected]

819. Mid-Am's acquisitions of Major and Standard were intended to, and did, remove Major and Standard as customers for any future competing milk marketing organization in southern and southwestern Missouri. [Rejected]

820. Mid-Am's acquisitions of Major and Standard were intended to, and did, further Mid-Am's monopolization of the procurement and sale of raw Grade A milk in southwest and southern Missouri. [Rejected]

We find and conclude that defendants are right and that NFO is wrong in regard to the factual arguments made in regard to the relief NFO seeks in its proposed injunction as it relates to mergers and acquisitions. The same detailed examination of the record is not possible in regard to other portions of equitable relief proposed by NFO because NFO relies primarily on language in the Court of Appeals' opinion rather than any factual data in the record.

We shall make additional findings of fact in the next part of the memorandum opinion on the injunctive relief issue on the basis of our review of the factual data cited by defendents in support of their proposed findings.[46]

V.

We make the following additional findings of fact in regard to Issue No. 7—Injunctive Relief:

[14] 1. Paragraph II of NFO's proposed injunction asserts that it seeks to prohibit the defendants from engaging in the same or similar activity found unlawful by the Court of Appeals. NFO, however, concedes that many of the provisions of that proposed injunction are based upon or

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[46]We agree with NFO's suggestion that defendants have proposed a great many more proposed findings of fact on the injunctive relief issue than are necessary for the determination of that issue. We believe that the findings of fact which we will make in the following section are sufficient under the circumstances.

derived from paragraphs of the Mid-Am and AMPI consent decrees.

2. To the extent the proposed provisions are drawn from the consent decrees this Court finds that such provisions are duplicative of relief heretofore granted in 1975 and 1977, and that NFO failed to present at trial any credible evidence which would establish the threat or likelihood of recurrence of the activities enjoined in those consent decrees.

3. Appropriate procedures exist for enforcement of any consent decree violation and NFO is not, as it claims, in any way prohibited from utilizing those procedures.

4. NFO's proposed relief as to milk haulers and hauling contracts is duplicative of existing relief in the Mid-Am and AMPI consent decrees. NFO offered no credible evidence that would support a finding that the enjoined activities were threatened or likely to occur in the future.

5. The consent decrees obtained against Mid-Am and AMPI-CMPC contain provisions which permit milk haulers to haul competitively for producers not affiliated with the defendants and enjoin other conduct relating to the sale of milk routes and exclusive hauling contract provisions. NFO adduced no credible evidence that additional equitable relief is necessary under the circumstances.

[15] 6. NFO's proposed provision II(10) which seeks to enjoin the defendants from issuing retroactive price reduction credits is impractical in its application, and such relief is unsupported by the credible evidence in this case.

7. NFO sought to establish by evidence adduced at trial which this Court expressly rejected as lacking credibility, that competitive credits issued by CMPC in the Chicago, Federal Milk Order No. 30, were anticompetitive.

[16] 8. NFO seeks through proposed paragraph III(1) to require the defendants to allow their dairy farmer

members an opportunity to terminate their marketing contracts upon 30 days notice given any time during the 12-month period following entry of any injunctive relief in this case. Appropriate and adequate injunctive relief designed to facilitate producers departure from the defendants organizations was incorporated in the Mid-Am and AMPI consent decrees. The consent decrees entered in *United States v. Mid-Am* and *United States v. AMPI* provided significant and adequate relief to NFO for the purpose of obtaining reasonable and legitimate access to dairy farmers. No further equitable relief is appropriate or necessary under the circumstances.

[17] 9. By proposed paragraph III(2) NFO seeks to have this Court force Mid-Am and AMPI to purchase Grade A milk from NFO in unknown and ambiguous amounts at plants chosen from time to time by NFO. Such relief is inappropriate as it is anticompetitive, not supported by credible evidence, impractical, and imposes undue burdens on the Court and the parties not contemplated in injunctive relief formulated to prohibit prior unlawful conduct.

10. NFO's proposed provisions on forced purchases would require this Court to referee for a period of five years the marketing of milk and resolve all disputes between the parties to this case over questions of "NFO's percentage", "geographic proximity", "plants . . . requirements", the proper "Class I/Class II ratios", and the "price and all terms and conditions of purchase and delivery." The terminology offered is so vague and indefinite as to be susceptible of untold interpretations, e.g., the right on the part of NFO to deliver milk simultaneously for unloading at the precise time as some other milk truck is unloading.

11. NFO's proposed provision in III(2)(b) seeks to impose an artificial allocation of the purchases upon the defendants contrary to the terms of the applicable federal milk marketing order. NFO's proposal is contrary to the principles of equity which this Court must apply in this case.

[18] 12. NFO's proposed injunction paragraph III(3) would require defendants for a period of five years after an acquisition to continue to purchase from NFO the same volume of milk (and on the same use classification) as NFO previously supplied to the plant over the twelve-month period immediately preceding the acquisition. Injunctive relief providing for the orderly relocation of milk previously delivered to any acquired facility and designed to prevent the defendants from foreclosing outlets for the milk of competing organizations are contained in the Mid-Am and AMPI consent decrees. No further equitable relief is either required or appropriate.

13. Substantially duplicative relief is not justified in this case particularly because NFO failed to establish by any credible evidence that any acquisition or merger resulted in a displacement of NFO milk sales for the reasons we have stated above in detail.

14. NFO introduced no credible evidence at trial that would support a finding that the conduct of Mid-Am or AMPI following the acquisition of independent dairies reflected any intention to block NFO rather than legitimate business decisions based upon price, quality or similar factors.

15. The acquisitions by Mid-Am of independent proprietary dairies did not result in any displacement of preexisting NFO sales and were not undertaken with any intent to block NFO from making sales of Grade A fluid milk.

16. The acquisitions by AMPI of independent proprietary dairies did not result in any displacement of preexisting NFO sales and were not undertaken with any intent to block NFO from making sales of Grade A fluid milk.

17. The *United States v. Mid-Am* consent decree required that Mid-Am divest itself of two milk facilities, one located in Kansas and the other in Missouri. No organization engaged in milk marketing sought to acquire these

facilities even though Mid-Am offered them for sale on reasonable terms.

[19] 18. In 1970 NFO declined to participate in CMPC and there is no evidence that NFO ever requested thereafter to participate in any CMPC program until the NFO motion for injunctive relief filed in 1983.

19. NFO's request that this Court issue a mandatory injunction requiring that NFO be permitted to participate in the CMPC Surplus Disposal Program is not supported by any credible evidence that such relief is either appropriate or necessary under the circumstances of this case.

20. There has been no showing by NFO that NFO has ever been denied access to the program on equal terms to those offered other CMPC participants in the program.

[20] 21. NFO's proposed injunction prohibiting the defendants from exercising their statutory rights under 7 U.S.C. §§ 608c(9)(B), 608c(12) and 608c(16)(B) is not based upon any evidence of unlawful behavior either exercised in the past or threatened or likely to occur in the future. Under the principles of equity governing this Court's remedial power, such relief is unnecessary and unwarranted.

22. We have concluded for the reasons we have above stated that, solely under the command of the Eighth Circuit decision, NFO is entitled to specific injunctive relief against the defendants in regard to sham litigation for the reason that the existing consent decrees in *United States v. AMPI* and *United States v. Mid-Am* do not contain a *specific* provision addressed to the initiation or maintenance of sham litigation and threats of litigation against potential buyers. It is appropriate under the circumstances that we reiterate our prior findings that Beatrice has purchased milk from NFO since at least 1977 and that Foremost has purchased milk from NFO commencing in July of 1975. (510 F.Supp. at 499, ¶ 1951, 510 F.Supp. at 475, ¶¶ 1115, 1117-18). We also reiterate our prior findings that Ewald

Brothers Dairy and Cloverleaf Dairy in Minnesota began buying milk from NFO in December 1972 and 1971, respectively. (510 F.Supp. at 491, ¶¶ 1635, 1636, and 510 F.Supp. at 491, ¶¶ 1629, 1631). We further reiterate our prior finding that both Wanzer Dairy and Kraml Dairy in Chicago remained customers of NFO from 1971 until the time of trial of this case. (510 F.Supp. at 485, ¶ 1431).

23. On remand NFO has chosen not to reopen the record and offer any additional evidence with regard to questions raised by the Eighth Circuit as to whether any cessation of purchases of Grade A milk following an acquisition or merger by any of the counterclaim defendants was done for an anti-competitive reason.

24. In addition to our findings stated in detail above in regard to mergers and acquisitions, we further find that the mergers and acquisitions referred to in NFO Exhibit 915, upon which NFO primarily relies, did not involve bottling plants purchasing Grade A milk for bottling purposes nor manufacturing plants buying surplus Grade A milk for the purpose of making manufactured milk products.

25. We further find that NFO's Exhibit 915 reflects that six (6) of the fifteen (15) acquisitions of AMPI were only receiving stations and that seven (7) out of the fifteen (15) acquisitions contained in NFO Exhibit 915 received only Grade B milk and were identified as having no Grade A milk receipts whatever.

26. We further find that Belle Plaine was a butter-milk powder facility having only Grade B milk producers as its members and all of its milk receipts for manufacturing purposes were Grade B milk.

27. We further find that Grey Eagle Cooperative was a receiving plant that also maintained a creamery. All of the dairy farmer members of Grey Eagle Cooperative produced Grade B milk and all of the receipts of Grey Eagle Cooperative were Grade B milk.

28. NFO failed to adduce at trial and has not sought on this remand to establish, that any milk sales agreement was not honored, that NFO's sales were cut off or that any cessation of business after the merger or acquisition was done for anticompetitive reasons and without valid business justification.

29. In further regard to AMPI's acquisition of Farmers Cooperative in Deer Creek, Minnesota, we find that NFO's evidence, NFO Exhibit 915, reflects that the Farmers Cooperative of Deer Creek was comprised totally of dairy farmers who produced Grade B milk and all of the milk receipts of that cooperative were Grade B milk.

30. In further regard to NFO's claim on remand in regard to North Star Dairy, we find that North Star Dairy was a sales federation selling the manufactured dairy products produced by its member cooperatives. As such, North Star Dairy was never "available" to NFO as it did not buy or sell fluid milk at any time.

31. In further regard to AMPI's purchase in 1973 of Theils Milk Products, a manufacturing plant located in Wisconsin, we find that the evidence in the record fails to disclose whether Theils was in the business of purchasing Grade A milk or Grade B milk or a combination thereof.

For the reasons we have stated in detail, it is

ORDERED (1) that NFO is entitled to an injunction which will specifically prohibit the initiation or maintenance of sham litigation and threats of litigation against potential buyers of NFO milk. It is further

ORDERED (2) that NFO is not entitled to any further equitable relief other than that stated in Order (1) under the factual circumstances and applicable principles of equity. It is further

ORDERED (3) that appropriate further proceedings will later be directed in regard to how the form of injunction shall be settled.

ISSUE NO. 8—COSTS

There is little that can be helpfully said in regard to the issue of costs. Counsel are familiar with the provisions of paragraphs 8 and 10 of the agreed order entered after oral argument. Counsel are also familiar with the report made by Mr. Donohoe in his letter of June 29, 1984 to the Court and with Mr. Barnes' sequel letter of July 10, 1984 to the Court in which he reported that the negotiations which followed oral argument for settlement of the cost petition have reached an impasse.

It is appropriate, however, that in this part of our memorandum opinion we rule NFO's recently filed motion for an order compelling compliance with its Rule 34 request that defendants produce all their billing record documents. For the question presented in regard to the pending motion is somewhat related to the issue of costs.

[21] NFO has suggested that its request for production and its pending motion to compel the production of defendants' billing records were filed "as a part of its continuing efforts to foster resolution of the attorneys' fee portion of this case . . ." (NFO May 30, 1985 reply memo). The primary difficulty with NFO's position is that "the attorneys' fee portion of this case" simply is not before the Court at this time.

Indeed, paragraph 12 of the agreed order entered after oral argument provides that "[a]t the conclusion of this Court's proceedings on remand, NFO will file its motion for Clayton Act attorneys' fees." The proceedings on remand have not been concluded. NFO has yet to file its motion for attorneys' fees.

The second difficulty with NFO's position is that the premature filing of such motion violates at least the spirit of the admonition of *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983) that a "request for attorneys' fees should not result in a second major litigation" and that "[i]deally, of course, litigants will settle the amount of a fee."

NFO counsel stated their agreement with *Hensley* at oral argument. (Tr. of Oral Argument at 458). They also stated their agreement "that the analysis of *Hensley* is certainly significant in resolving the cost question." (Tr. of Oral Argument at 471).[47]

This is not the only case in which this Court has required the parties to comply with *Hensley's* admonition; indeed, the standard procedures of this Court attempt to require compliance with *Hensley's* admonition in all cases which pend in this Court. Detailed directions of further proceedings, for example, were made in *Moats v. United States,* 564 F.Supp. 1330, 1346 (W.D.Mo.1983), for counsel to comply with *Hensley's* admonition. The later report of that case, published in 576 F.Supp. 1537, 1542 (W.D.Mo.1984), shows that this Court was able to enter judgment for attorneys' fees in an "agreed amount." *See also* page 28 of our unreported opinion in *United States v. Estridge,* No. 82-0455-CV-W-1, decided January 5, 1984, in which substan-

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[47]See also this Court's statement to defendants' counsel when we stated that: "Don't go any further than the *Hensley* case, which you cite and rely upon. The *Hensley* case says there is not to be second major litigation about fees, and I am applying the rationale of that case to no major second litigation about costs, and the burden of working out these problems about which there should be no dispute about the facts is going to be shifted to counsel upon a manner and schedule of negotiation that you will get these things worked out in the manner I indicated when I was talking with Mr. Gerlach." (Tr. of Oral Argument at 494-95).

tially the same directions as those ordered in *Moats* were given.

In *Estridge* we further stated that: "The files and records in *Moats II* established that the parties were able to agree upon the amount of attorneys fees to be awarded. We trust that a similar agreement may be reached in this case." (No. 82-0455-CV-W-1 at 30.) Counsel in *Estridge* were able to reach agreement in that case on the amount of fees to be awarded and an appropriate judgment was thereafter entered.

It is appropriate that we direct attention to other orders entered in *Estridge*. For those orders reflect standard procedures which this Court has followed in many other cases involving attorneys' fee awards. The following orders, among others, were entered in that case:

> ORDERED (1) that the Clerk in accordance with Rule 58 of the Federal Rules of Civil Procedure, prepare on separate documents the judgments which we have indicated should eventually be entered in this case. The Clerk shall confer with counsel for the respective parties to obtain a judgment agreeable to counsel as to the form of each of the judgments to be entered. The Clerk shall not, however, enter any of the judgments until further order of the Court.
>
> The reason the Court directs that the Clerk delay entry of any of the judgments on the merits of the various claims and on O'Crowley's counterclaim is to coordinate the time for any appeal from the entry of such judgments with any appeal that may be noticed in connection with the award of any attorneys fees that may be made to O'Crowley under 28 U.S.C. § 2412. *See and compare Obin v. Dist. No. 9 of Intern. Ass'n., Etc.*, 651 F.2d 574 at 584 (8th Cir.1981).

(No. 82-0455-CV-W-1 at 30).

The Court of Appeals stated in *Obin v. Dist. No. 9*, 651 F.2d 574, 583 (8th Cir.1981), that: "This court deems it essential that all district courts follow a consistent practice of promptly hearing and deciding attorney's fees claims in

civil rights and other cases so that any appeal by an aggrieved party from the allowance or disallowance of fees can be considered by this court together with any appeal taken from a final judgment on the merits."

The Court of Appeals explained in *Obin* that "the problem of possible piecemeal appeals need not arise where the trial court delays entry of judgment on the merits pending determination of attorney's fee claims and thereafter enters a single final judgment determining all issues." (*Id.* at 583). That admonition of the Court of Appeals will be followed in this case.

The time will come for counsel to resume their negotiations concerning costs. After NFO will have filed its motion for Clayton Act attorneys' fees in accordance with paragraph 12 of the order entered after oral argument, the time will come for counsel to conduct appropriate negotiations concerning those attorneys' fees and to conduct negotiations in regard to all other attorneys' fees for which various awards will be made in connection with other issues decided in this memorandum opinion.

When those negotiations are commenced, the Court suggests that counsel for all parties consider what was said in Part V, *Rainsbarger v. Columbia Glass & Window Co.*, 600 F.Supp. 299 at 304 (W.D.Mo.1984), in regard to how *Hensley* and the Eighth Circuit cases cited therein are to be applied in the rare cases in this Court in which counsel were not able to meet the ideal stated in *Hensley* that "litigants will settle the amount of a fee."

For the reasons stated it is

ORDERED (1) that the parties will be directed to reopen their negotiations on the issue of costs in accordance with procedures to be established in an order directing further proceedings. It is further

ORDERED (2) that NFO's pending Rule 34 motion to compel production of defendants' billing records, should be and the same is hereby denied.

ISSUE NO. 9—CERTIFICATION OF NFO DAIRY FARMER CLASS

I.

The class action issue pends on NFO's class counterclaimants' motion, filed after remand, for certification of a NFO dairy farmer class. Unlike a number of other issues presented after remand, the motion to certify a NFO dairy farmer class was not in any way discussed in the briefs filed in the Court of Appeals. Indeed, counsel for the NFO dairy farmer class concede that "the whole issue of class action just did not come up at any point in the appellate process." (Tr. on Oral Argument at 545). Although the Court of Appeals discussed various damage issues which this Court did not reach, it did not in any way suggest that this Court, on remand, should consider the certification of a class of NFO dairy farmers.

Counsel for the NFO dairy farmer class, however, point to the portion of a single sentence in the Court of Appeals opinion which stated that "[t]hose who directly suffered price reduction damages are individual farmers . . .", 687 F.2d at 1209, and suggest that the NFO class claimants "are asking this Court to reconsider its initial decision not to certify a class" (NFO class claimant reply brief at 5).

Indeed, NFO class claimants have suggested that this Court indicated during the pretrial stages of this case that "its refusal to certify the NFO Dairy Farmer class . . . was subject to reconsideration at any time" and that "a fair reading of this Court's statements with respect to the class action issue is . . . that certification was denied without prejudice because this Court had formed a 'tentative judgment' that a class was not needed to guard against the

possibility that NFO was not entitled to collect all the damages that might ultimately be proven." (*Id.* at 3, 5).

Defendants vigorously dispute NFO's class claimants reading of the record. Defendants direct attention to the long and complicated manner in which the question of NFO's standing to recover any damages was considered in tandem with the positions that were being maintained by both Mid-Am and by NFO in regard to whether class actions should be certified for members of either of those marketing organizations. Defendants also raise substantial questions in regard to whether, under the procedures followed by the parties, the claims of the NFO class claimants have been barred by *res judicata* under the rationale of *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981); whether this Court's denial of class certification is the law of the case; whether the claims of the NFO class claimants are time barred; and whether a class certification may properly be made after a judgment on the merits under the circumstances of this case.

NFO class claimants reply to the foregoing questions raised by defendants, by stating that all of the foregoing arguments "proceed from totally erroneous premises as to what has happened in this case." (*Id.* at 1). NFO class claimants argue that the greater portion of defendants' arguments as above outlined rest "on the assumption that a judgment was entered against the NFO class claimants and that the class claimants then failed to appeal." (*Id.* at 1). It was then argued that "[n]o judgment in fact was ever entered against the class claimants, and, in the absence of such a judgment, the class claimants *could not* appeal." (*Id.* at 1. Emphasis in the brief).

Without any discussion of whether NFO class claimants *could* have appealed this Court's denial of NFO class claimants' class action motion, NFO class claimants would blow defendants' arguments to one side by stating, for

example, that defendants know that their "*res judicata* argument is nothing but pure, unadulterated fluff, predicated on the assumption that this Court can be sandbagged by defendants' blithe distortion of the record."[48] (*Id.* at pp. 4-5).

Because the parties radically disagree in how the record should be read, it is necessary that we state the history of the class action positions that were maintained by the parties and the reasons why this Court refused to certify a class of NFO dairy farmers.

II.

The long and complicated history of the NFO class issue commenced with the filing of NFO's first amended complaint filed June 25, 1971. That amended complaint alleged in paragraph 59 that "[t]he class consists of all members of the NFO." Appendix A attached to NFO's amended complaint listed the names of twenty-one farmers who were alleged to represent "all members of NFO."

NFO's class claimants' suggestions in support of their post-remand motion for a certification of a NFO dairy farmer class is based on the untenable notion that the procedural history in regard to the certification of a NFO dairy farmer class commenced with the filing of NFO class claimants' motion for certification filed February 1, 1974

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[48]Indulging in similar strong rhetoric, NFO class claimants state that defendants' law of the case argument "attack on the class certification is a first cousin to the *res judicata* argument and is equally moribund"; that defendants' statute of limitations argument is "a nephew of the two arguments analyzed above"; and that defendants' argument that a class may not properly be certified after final judgment "is just some imaginative nonsense to the effect that the NFO class claimants somehow 'positively disclaimed' their class certification efforts by only having them denied twice and by not taking an appeal." (*Id.* at 5, 7, 8).

and that the only relevant discussion of the class action questions presented in this case took place in pretrial conferences convened after that date.

An accurate review of the record establishes that the problems associated with NFO's alleged class action, after it was filed on June 25, 1971 were always considered in tandem with the problems associated with class action alleged in Mid-Am's complaint.

Both Pretrial Conference No. 2, held May 26, 1971, and Pretrial Conference No. 3, held June 17, 1971, were convened and held before NFO filed its first amended counterclaim on June 25, 1971. Although Pretrial Conference No. 2 was convened for additional purposes, the discussion at that conference shows that the problems associated with Mid-Am's class action were discussed as Item 6 on the agenda for that conference. Counsel were directed at Pretrial Conference No. 2 to attempt to find a solution agreeable to all parties, but should they fail to reach agreement, a briefing schedule should be agreed upon under which "all briefs on that [Mid-Am] class action question, . . . shall be in the Court's hands not later than June 15, 1971, in order that the Court have an opportunity to become fully acquainted with the positions of the parties and be in a position to make a definitive ruling on those questions at the June 17th pretrial."[49]

Everyone concerned knew by the time Pretrial Conference No. 3 was held on June 17, 1971 that a class action was

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[49]The Court added that "[t]he Court expressed the hope off the record and will express it on the record that the desire of all counsel to find a solution to this problem be given very serious consideration and that the suggestions made at the conference as to alternative solution be fully exhausted before they give up on the question of whether we are forced to litigate as a class action." (*Id.* at 36).

going to be filed by the NFO class claimants in the very near future.

"Class action problem or problems" was described as "the number one item" on the agenda for Pretrial Conference No. 3. (Pretrial Conf. No. 3 Tr. at 79). That item was reserved for full discussion on the afternoon of the conference. The Court stated the following in regard to that agenda item:

> The discussion in the briefs thus far has not focused upon that portion of Rule 23 (b) which requires as a prerequisite for a class action that the utilization of a class action provides a superior procedure to other available procedural devices that are presently in the rule.
>
> I think all counsel have cited that section, but close attention has not really been given to it, and I have the feeling, consistent with what we discussed at the last pre-trial, that even without agreement on anybody's part, although it would be much safer if there was agreement, that available devices may be available which are most superior to a class action device and which certainly in the exercise of discretion would require an evaluation of the explicit requirement of avoiding the difficulties that are inherent in any class action case.[50]

(Id. at 84).

This Court further stated on June 17, 1971 that "I think counsel are entitled to know that I have to be convinced that there is a real necessity for a class action in this case on either side" and that "I think also that with very little additional cooperation it is completely feasible for each side to guarantee the other that the inevitable appeal of this case, regardless of what happens on the District Court level,

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[50]The Court later added that "I only reiterate that I think it is feasible to protect everybody's rights and to litigate the questions which are coming into focus without the necessity of using a class action on either the plaintiff's side or the defendant's side." (*Id.* at 90).

that particular questions of procedure are not going to send this case back for retrial. . . . " (*Id.* at 91). The transcript of Pretrial Conference No. 3 shows that the briefs filed by the parties and the class action problems presented were discussed off the record during the entire afternoon of June 17, 1971 and again when the conference was reconvened on June 18, 1971. The Court, in accordance with its usual practice stated the following on the record:

> THE COURT: Let the record show that a good many hours have gone by since we went off the record to discuss our most difficult problem, namely, to work out effective procedures which will protect all parties in regard to the class action problem or problems item on the agenda.
>
> The very full discussion of this problem established that it would not be appropriate for the Court to enter any order today, but to permit the parties to work further, consistent with their basic agreement reflected during the discussion that the procedural problems as they relate to the plaintiff and the procedural problems which relate to the defendant NFO on its counterclaim present substantially similar problems and that the procedures which would afford an effective solution to those problems would fall in essentially the same pattern.

(*Id.* at 99).

Although NFO had not yet filed its amended counterclaim which would include the NFO class action claim, the record is clear that all of the efforts to find a solution to the class action problems included both Mid-Am's class action claim and the class action which would shortly be asserted on behalf of the NFO class claimants in the amended counterclaim. NFO was granted leave to file and did file its amended counterclaim on June 25, 1971. The records shows that at some time thereafter, the problems created by Mid-Am's and NFO's class action claims were considered as a single problem.

NFO and the NFO class claimants made three filings in opposition to Mid-Am's class action claim before Pretrial Conference No. 4 was convened on August 17, 1971. On June 11, 1971 NFO defendants filed suggestions in opposition to Mid-Am's motion for designation of class action (Exhibit D attached to Defendants' Opposition Suggestions).[51] On June 15, 1971, NFO filed its "Comments on Plaintiff's 'In Camera' brief" (Exhibit C, attached to Def. Oppos. Sug.) and a reply brief in opposition to plaintiffs' motion for class action (Exh. B attached to Def. Opp. Sugg.).

Pretrial Conference No. 4 was held August 17, 1971. NFO's amended counterclaim had long been on file. The transcript of that conference shows that the Court made inquiry whether the parties had been able to find a solution to the class action problem. (Pretrial Conf. No. 4 Tr. at 50). The Court was advised that although considerable progress had been made, the parties were not yet in complete agreement in regard to a solution (*Id.* at 51). Counsel for NFO and the NFO class claimants stated that the class action problems had, to a certain extent, "been partially solved" (*Id.* at 128). Counsel for Mid-Am indicated that Mid-Am might eventually seek leave to file an amended complaint which would not include any class action claims (*Id.* at 127-128).

This Court accordingly granted counsel for the parties additional time to seek a solution to the class action problems that would be agreeable to all parties. The Court observed that the briefs thereto filed in regard to class action questions "make the point that Rule 23 should not be followed as far as designation of classes if there is a superior

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[51]Defendants stated that Exhibit D was filed "on or about August 4, 1972." The files and records show that it was filed June 11, 1971 as stated in text. That filing also shows on its face that it was filed before June 15, 1971.

method" of processing the case. (*Id.* at 132).[52] The Court further advised counsel that "I have indicated that I am yet to be convinced (a) that there is not a superior method to solve the problem, and (b) I am yet to be convinced that there is a necessity for a class action on either side. . . ." (Pretrial Conf. No. 4 Tr. at 132). Counsel were directed that each party should state in writing their views in regard to how the class action problem should be solved on or before August 23, 1971. (*Id.* at 134).

III.

It was in the context of all of the foregoing circumstances that on August 23, 1971, in compliance with this Court's directions made at Pretrial Conference No. 4, NFO filed its statement on behalf of all counterclaimants entitled "NFO statement of position on pending class action claims" (Appendix A, attached to NFO and NFO class claimants' supporting brief).[53]

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[52]That statement, of course, merely directed counsels' attention to the familiar and well established class action principle stated in 7A Wright & Miller, Federal Practice and Procedure, § 1779, p. 57-58 which stated that "[t]he second requirement that must be satisfied before an action may be brought under Rule 23(b)(3) is that the court find the class action to be superior to other available methods for the fair and efficient adjudication of the controversy. It is not enough that the Rule 23(a) prerequisites have been satisfied. The rule requires the court to make a determination that the objectives of the class action procedure really will be achieved in the particular case."

[53]The opening sentence of NFO's statement stated that it was being filed "in response to a request the Court made at the pretrial conference held *October* 17 and 18, 1971." The direction to file the statement was made at Pretrial Conference No. 4, held *August* 17 and 18, 1971. NFO and NFO class claimants' supporting brief appropriately acknowledges that the statement was, in fact, filed August 23, 1971.

The NFO August 23, 1971 statement accurately described "the two pending class action claims" as follows: "These claims are (1) the Mid-Am proposal to represent a plaintiff class composed of all Mid-Am members, excepting those Mid-Am members who are named as co-conspirators in the Mid-Am complaint and also excepting those Mid-Am members who have authorized Mid-Am to make certain marketing deductions in favor of NFO amounting to $0.03 per hundred weight for the milk they market to Mid-Am, and (2) the NFO proposal to represent a counterclaimant class composed of all NFO members." The NFO statement added: "Because there has been no showing that class actions constitute a superior means to resolve the issues in this litigation, it is NFO's primary position that no classes should be certified by the Court. Accordingly, despite its own class action claims, NFO adheres to the position it has taken in the brief heretofore submitted in opposition to Mid-Am's class action proposals." (App. A, p. 2, of NFO Aug. 23, 1971 statement).

NFO added, however, a qualification to the position it flatly stated by suggesting that "if the Court should certify a Mid-Am plaintiff class, then NFO proposes a class of counterclaimants composed of all NFO members so that this litigation can proceed on a basis which keeps the contending parties on an equal footing." (App. A at 2 of NFO Aug. 23, 1971 statement).

It is important to add that NFO also stated that "NFO does not agree to Mid-Am's proposal that all class action claims be dropped, that all individual plaintiffs and counterclaimants be eliminated from the case, and that the entire litigation proceed on an organization-versus-organization basis." The NFO statement purported to explain its position by stating that "NFO is not willing to litigate the counterclaim by itself, without the named NFO member counterclaimants as parties, because Mid-Am has repeatedly contended that NFO as an organization lacks standing

to assert the antitrust claims upon which its case is based."[54]

The files and records in the case show that further efforts to solve the class action problems were unsuccessful. The question was the subject of extended discussion at Pretrial Conference No. 12 held July 20, 1972. The Court again expressed the hope that "all of us collectively ought to be smart enough to work out procedures that were not plagued with the procedural problem of class action. . . ." (*Id.* at 73). Counsel agreed to file a memorandum of their views on the class action problem in advance of Pretrial Conference No. 13 which was scheduled to be held on August 10, 1972 (*Id.* at 75).

The class action problems were placed on the agenda and discussed in detail at Pretrial Conference No. 13. The Court stated at that pretrial conference that:

> . . . the Court is not satisfied by anyone that any party has made a case which requires this Court at this time to rule and to designate the particular classes which may or may not be necessary for the determination of this case.

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[54]The NFO August 23, 1971 statement made clear that unless the defendants agreed to concede that their legal position is regard to NFO's standing to assert the antitrust claims alleged in NFO's amended counterclaim was untenable, that NFO would insist that a class of "all NFO members" be certified. The NFO statement expressly stated that: "So long as Mid-Am (or any other counterclaim or cross-claim defendant) adheres to this contention, NFO cannot prudently litigate the counterclaim without individual member counterclaimants." (App. A at 2-3 of NFO Aug. 23, 1971 statement).

NFO's statement made it apparent that NFO was going to try to "sandbag", to use one of NFO's words, the defendants to get them to give up their legal position on NFO's standing to recover damages.

> I will also state that no one has made any suggestion whatever as to why at the present time it is necessary that a class be designated. I think that by the time you wade through the paperwork, the real question is put in focus by Rule 23(b)(3), which requires this Court's discretion to be controlled by whether or not a class action is "superior to all other available methods for the fair and efficient adjudication of the controversy."

(Tr. of Pretrial Conf. No. 13, p. 59-60).

The Court added, however, that "[i]f designation of classes in here at this time is helpful to anyone, and if this is the only alternative to solve particular problems, I am going to get into that question, but I simply do not see that this is a superior method of solving the problems that presently plague the preparation of this case." (Tr. of Pretrial Conf. No. 13, p. 78.).

Mid-Am's class action was the subject of particular discussion at Pretrial Conference No. 13. Counsel for Mid-Am indicated that under appropriate conditions, Mid-Am could decide that it would no longer seek the certification of a class action on behalf of Mid-Am. Mid-Am counsel added: "I would suggest then that if the other parties are willing to make the same decision, it would seem to me that all class action problems could be resolved and resolved immediately." (*Id.* at 79).

Counsel for NFO and NFO class claimants made clear that the solution suggested by Mid-Am was not acceptable and that NFO was not willing to change its "sandbag" position:

> We do believe quite firmly that until such time as we get a concession from all adversary parties that they are not going to press the issue of standing, or to contend that NFO cannot recover injuries to its business or property on the ground that those injuries were really

> inflicted upon the members, that we must insist upon *the protective NFO class.* (Emphasis ours)[55]

(Tr. of Pretrial Conf. No. 13 at 86).

IV.

The class action problem lay dormant until this Court entered orders on January 10, 1974 "in order to determine the definitive positions of the various parties in regard to all class action questions." (See Appendix B, attached to NFO supporting brief). Order (1) entered that day required all parties to state their respective positions within fifteen days. Order (2) provided that:

> ORDERED (2) that should any party assert that a class action is cognizable by this Court, his brief shall describe with particularity the class he alleges and state the manner in which the alleged class action satisfies the requirements of Rule 23, Federal Rules of Civil Procedure. Should the position of the party be that a complete determination can not be made at this stage of the proceedings, his brief shall describe why further discovery is either necessary or proper in order to make that adjudication.

(NFO supporting brief, Appendix B at 1).

NFO and NFO class claimants, as required by this Court's January 10, 1974 order, filed a motion for certification of the NFO dairy farmer class. See Appendix C attached to NFO's supporting brief. That motion sought certification of exactly the same class as that which NFO and NFO class claimants now seek to have certified under their pending post-remand motion. The suggestions in

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[55]NFO and NFO class claimants stated at Pretrial Conference No. 13 held August 10, 1972 that it was insisting on what it called a "protective NFO class." This was, of course, consistent with its August 23, 1971 statement that unless defendants would waive their legal argument that NFO lacked standing, it would continue to seek to have a NFO class certified.

support of that February 1, 1974 (see Appendix D attached to NFO supporting motion) presented substantially the same arguments that are presented in the post-remand brief filed by those parties in support of their pending post-remand motion. Indeed, parts of the post-remand brief are actually copied from the February 1, 1974 brief.

For example, in describing the persons selected as class representatives, the following portion of the post-remand brief was copied from the 1974 brief:

> All nine representatives have served in elected positions in their respective county, district, or state NFO organizations. At the county level seven representatives have served as chairman or members of their county dairy bargaining committees, and the other two have served as treasurers of their county organizations. At the national level two representatives have served on NFO's national board of directors.

(NFO Sug. in Support, Doc. 13 at 13).

In similar fashion, on the superior method issue presented under Rule 23(b)(3), the remand brief copied the following language from the 1974 brief:

> Given the large number of the NFO dairy farmer class members, the cohesiveness of this group, the complexity of the litigation, and the fact that class members' damages are insufficient on an individual basis to permit the institution of separate actions, the question here is not whether the class action is a superior method for adjudicating the controversy, but rather whether there is any other method available for adjudicating these claims.

(NFO Sug. in Support, Doc. 13 at 20).

And on the question of whether the class action would present management difficulties[56], the post-remand brief

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[56]The problem of management stated in 7A Wright & Miller, Federal Practice and Procedure, § 1784, p. 119, had been discussed many times in the continuing efforts to seek a solution to

copied the following from the 1974 brief:

> The NFO dairy farmer class is "neither ill-defined nor ephemeral." *Berman v. Narragansett Racing Association,* 414 F.2d 311, 317 (1st Cir.1969), *cert. denied,* 396 U.S. 1037 [90 S.Ct. 682, 24 L.Ed.2d 681] (1970). Indeed, this class has been defined with a view to eliminating management problems. Take the notice requirement, for example. There is a reasonably limited number of class members, and NFO knows where they are. As in *Philadelphia Electric Company v. Anaconda American Brass Co.,* 43 F.R.D. 452, 463-64 (E.D.Pa.1968), these class members share that "pre-existing bond of association," which has been held to be the primary criterion for determining the proper boundaries of a class.

(NFO Sug. in Support, Doc. 13 at 22).

The 1974 NFO and NFO claimants' brief did not in any way suggest that its motion for certification of a NFO dairy farmer class was not ripe for determination.[57] Indeed, that 1974 brief made clear that NFO and the NFO class claimants were simply maintaining their "sandbag" position that a "protective NFO class" should be certified.

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the class action problems presented in this case: "Rule 23(b)(3)(D) obliges the court to consider the management difficulties when determining whether the class suit is the best means of resolving the controversy, and this may encourage a court to refuse to give a case class action treatment. But even when that hurdle is surmounted, problems relating to the judicial administration of the relief take on a special significance in determining the amount of the damages and distributing the recovery among the members of the class.

[57]This Court's January 10, 1974 order expressly stated that "Should the position of the party [that a class action should be certified] be that a complete determination can not be made at this stage of the proceedings, *his brief shall describe why further discovery is either necessary or proper in order to make that adjudication.*" (Emphasis ours).

Pretrial Conference No. 20 was scheduled for February 5, 1974 in order that a definitive ruling be made on the two pending class action motions. Accordingly, "class action status" was placed as the No. 1 item on the 16-item agenda. (See Tr. of Pretrial Conf. No. 20 at 4).[58] Item 10 on that agenda was "Mid-Am motion for leave to file 5th amended complaint in Alexander case."

Item 10 was considered in connection with Item 1 for the reason that if leave was granted for the filing of Mid-Am's proposed 5th amended complaint, all problems relating to Mid-Am's class action would be eliminated from the case.

After full discussion and after having ascertained that NFO had no objection to the filing of Mid-Am's "amended complaint which would eliminate the plaintiffs' [Mid-Am] class," Mid-Am was granted leave to file its 5th amended complaint. (*Id.* at 7-8).[59]

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[58]The Court stated at the outset of that pretrial conference, which was combined with Pretrial Conference No. 5 in the multi-district litigation that "I am prepared to give counsel all the time that it is necessary to clear out the underbrush, direct appropriate proceedings and a schedule which will fix a firm trial date, at least of the Texas case." The Court added that "[t]he first item on the agenda, and an item of importance, is a final and conclusive determination of whether or not there be any designation of any classes by any party in the Alexander case. I entered an order directing the parties to state their respective positions and views as to the necessity of a class."

[59]Mid-Am's counsel correctly stated that the purpose of the Court's issuance of its January 10, 1974 and the thrust of the questions addressed to all counsel in regard to the responses filed pursuant to that order was to determine whether "the parties [are] willing to stand upon their contentions; in other words, NFO has contended throughout that NFO was entitled to collect these damages for their members, and I think the Court quite correctly said, 'Stand up and be counted.' " (*Id.* at 25).

NFO and NFO class claimants made clear at Pretrial Conference No. 20 that they would not change their position in regard to having a "protective NFO class" certified unless the defendants would concede on the record that their arguments concerning NFO's standing were untenable. (*See* pages 16-20 of transcript of Pretrial Conference No. 20.) When NFO and NFO class claimants' counsel suggested that "the matter might not be ripe for ruling," the following occurred:

> THE COURT: Well, I wanted to ask you one additional question. In my order of January 10 I made inquiry of what additional evidence may be necessary and whether any additional discovery was either necessary or proper in order to make the class action adjudication under Rule 23.
>
> Do you anticipate that there would be any necessity for additional discovery as far as you are concerned?
>
> MR. ROWLEY: No, Sir, Your Honor, with one caveat. I do not know what adversary counsel may say in terms of criticism which might require factual investigation by discovery or otherwise, but with that limited exception—

(*Id.* at 26-27).

The responses on file in response to this Court's January 10, 1974 order did not indicate that defendants had said anything about the need of further factual investigation.[60] The Court accordingly proceeded as follows:

> THE COURT: All right, I am going to indicate my ruling on Item 1 of the agenda.
>
> The Court is not going to designate any class in this litigation, and I do not do so for the reason that Rule 23 requires a finding that a class action is superior to

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[60]Counsel for Mid-Am stated: "MR. THOMSON: Judge, I think it obvious that the class proposed by Mr. Rowley, I think the Court could rule this morning that no class exists." (*Id.* at 30). No one else, including NFO, suggested anything to the contrary.

all available methods for a fair and efficient adjudication of the controversy.

In light of the questions presented, and articulated, and in light of the fears expressed by NFO as to a compelling necessity to be on the safe side, the Court is confident that there are all kinds of procedures that may be resorted to to solve the questions presented.

I cannot find in light of the development of this case that the difficulties likely to be encountered in the management of this case as a class action can be ignored. This case without a class action, I think, can fairly be classified as a difficult case to manage. The addition of the additional complication of class when they are sought by only one party, it seems to me, to outweigh the difficulties of manageability as we proceed as far as the case is concerned.

My denial of the designation is without prejudice to later suggestions as to solve the problems of distribution of damage. . . .

(Tr. of Pretrial Conf. No. 20 at 30-31).

After this Court's definitive ruling that NFO and NFO claimants had not carried the burden of having the "protective NFO class" certified on both superiority and management grounds, the record shows the following:

MR. ROWLEY: If Your Honor please, do I understand that Your Honor is suggesting that we devote our attention to some such procedure as for example was followed in the Nisely [sic] case?

THE COURT: Yes, and I think, Mr. Rowley, actually this question is also related very, very directly to Item 15 as to the trial plan and how the parties actually are going to try the various cases, and if particular procedures are determined upon, the problem becomes infinitely more simple.[61]

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[61]NFO's Counsel's reference to "*Nisley* case" was a reference to *Union Carbide and Carbon Corporation v. Nisley*, 300 F.2d 561 (10th Cir.1962), *dismissed*, 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed.2d 46

(Tr. of Pretrial Conf. No. 20 at 32).

Counsel were directed to prepare an agreed draft of Pretrial Order No. 7 which would reflect the various rulings made from the bench during the combined Pretrial Conference No. 20. Shortly thereafter the Court received a letter dated March 2, 1974 from NFO counsel, together with a copy of a letter of the same date that NFO counsel wrote Mid-Am counsel. Those letters registered NFO's disagreement with a draft order which had been sent counsel by Mid-Am counsel.

Those letters, among other things, suggested that no ruling should be made on NFO's class action motion "[u]ntil such time as the Court works out effective practical alternatives which will enable NFO to collect its dairy members' economic damages without being subjected to unnecessary appellate risks."[62] NFO counsel's March 2, 1974 letter to the Court concluded with the following paragraph:

(1963). That case approved procedures under which the fact of injury was submitted to the jury for determination and the amount of each individual miner's actual damages was left for later determination. Page 74 of transcript of Pretrial Conference No. 12, held July 20, 1972 shows that the Court had discussed the procedures approved in *Nisley, see* 300 F.2d at 587 et n., with counsel at still earlier sessions as a possible superior method of solving the class action problems that plagued this case from the outset. The record shows that NFO and NFO class claimants were never willing to seriously discuss any agreement that utilized the *Nisley* procedures in this case until after this Court had denied the motion for certification of a "protective NFO class."

[62]The letter to the Court also suggested that "a *Nisley* procedure [might be followed] after it has been made the binding law of the case either by way of interlocutory appeal or stipulation among the parties," the discussion of which NFO had consistently resisted until its motion for the certification of a "protective NFO class" had been denied.

> If, despite the foregoing, Your Honor should deny NFO's class action motion at this stage, NFO respectfully requests that the question be certified for review by the Eighth Circuit pursuant to the provisions of 28 USC Section 1292(b), as involving a controlling question of law on which an interlocutory appeal may materially advance the ultimate termination of the litigation.

The Court noted at the outset of Pretrial Conference No. 21, held March 5, 1974 in tandem with Multidistrict Pretrial No. 7, that a problem had arisen in regard to the language of Pretrial Order No. 7 (Tr. at 4). The Court noted that "the greatest problem, in spite of some quite long letters, resolves basically around paragraph one as to the disposition of the class action" (Tr. at 39). The Court suggested that the difficulties in drafting paragraph 1 of Pretrial Order No. 7 might have been due to the fact that "you gentlemen . . . seem to be laboring under the impression that the Court's refusal to designate a class for NFO in accordance with your present application in response to an order that I issued, as I recall, in January is somehow a final decision and precludes any subsequent application under the circumstances, and I think in one of your letters you even suggest that it would be appropriate to certify under 1292(b)."

The Court then stated it did not believe that a Section 1292(b) interlocutory appeal should be certified in connection with its denial of NFO and NFO class claimants' motion. The Court further stated that what it had ruled at Pretrial Conference No. 20 was "that the showing made and under the circumstances as I stated them of record in ruling the motion, I did not feel that the designation should be made at that time." (Tr. of Pretrial Conf. 21 at 42). The Court further made clear that "I have not eliminated any possible procedures designed on the *Nisely* [sic] case in the Tenth Circuit." (Tr. at 42). The Court added: "So this is still open and I have the feeling that if Pre-Trial Order No. 7 makes clear that this is simply a refusal without prejudice, subject to renewal at an appropriate time, that you can find

language to recite that without difficulty." (Tr. at 42-43). The record then showed the following:

> MR. ROWLEY: Would it be within Your Honor's contemplation that Pre-Trial Order No. 7, since it represents no judgment whatever in connection with the class action motion, be silent on the subject.
>
> THE COURT: Well, it does represent a judgment. I stated definitively that the presentation and the absence of a designated class was not sufficient to designate on the showing made. . . . I did deny that application and would not hesitate to have the record show that that denial is without prejudice.
>
> MR. ROWLEY: Yes, sir, I appreciate Your Honor's ruling. I hope Your Honor understands our position because it is firmly our position that on the basis of the showing made, we are entitled to a class action, and that being so, we want the record to be sufficiently clear so that if Your Honor will not certify the matter, we will be in a position to have the matter taken up, notwithstanding.

(Tr. at 43-44).

After considerable further discussion, which included Mid-Am counsel's statement that "we will go back and try to redraft paragraph No. 1 [to state] . . . that the pending motion of NFO for class designation, is hereby overruled without prejudice" (Tr. at 46) and further references to *Nisley*'s procedures (Tr. at 47) the record then shows that the following occurred:

> MR. ROWLEY: Before we close, Your Honor, let me put on the record, NFO's specific request that if Your Honor overrules at this time, even without prejudice, NFO's class motion on the present record, that the matter be the subject of certified interlocutory appeal. Short of that, NFO would be constrained to seek relief under the all writs act, because in our view, this is a matter of extreme importance and we think the record will not support even an adjudication of the order Your Honor has suggested.

> THE COURT: Well, I can tell you this, that the ruling I made from the bench in connection with that motion was denied and it was denied without prejudice and may be renewed at any appropriate time, and I will also state at this time on the record that I will consider your request as a motion to reconsider, unsupported by any additional authority; I will deny that motion and I will refuse to certify either my initial denial or my refusal to reconsider, as an appropriate case to be certified to the Court of Appeals under Section 1292(b) of Title 28 of the United States Code. So you have your record—
>
> MR. ROWLEY: Thank you.

(Tr. at 48-49).

V.

Pretrial Order No. 7 was thereafter entered on March 8, 1974. Paragraph 1 of that order stated:

> 1. Any motion of NFO counterclaimants, including that filed February 1, 1974, for certification of a class consisting of NFO dairy farmers is hereby denied, without prejudice to the rights of any party to file subsequent motions, including a class action motion, with respect to the manner of processing claims which may be involved in this litigation. It may be refiled at any time. All other motions seeking a determination of certification of the class action have been withdrawn, and no request by any other party for a class action now pends before this Court.

(Exh. H at 1 attached to Joint Sug. of Counterclaim Defts in Oppos. to Mot. for Cert. of NFO Dairy Farmer Class (Doc. 28)).

The files and records in this case establish that NFO and NFO class claimants never refiled any class action motion until after this case was remanded by the Court of Appeals. Nor did NFO ever attempt to have this Court give any further consideration to the adoption of the rationale of the *Nisley* procedures to the circumstances of this case. We

further find that NFO and NFO class claimant's contention that "a fair reading of this Court's statements with respect to the class action issue is . . . that certification was denied without prejudice because this Court had formed a 'tentative judgment' that a class was not needed to guard against the possibility that NFO was not entitled to collect all damages that might ultimately be proven" is completely unsupported and quite contrary to the full record in this case.

Indeed, a fair reading of the record establishes that NFO, after its unsuccessful effort to obtain the certification of what it called its "protective NFO class," concluded, as did Mid-Am, that it was required to stand or to fall on its legal claim that NFO, the corporation, rather than the NFO dairy farmers, was entitled to recover any and all antitrust damages that might eventually be recovered in this case. It is obviously clear that NFO elected to adopt that legal theory and that it continued to rely on that theory until the Court of Appeals decided that its view, so far as price reduction damages was concerned, was untenable. Then, but only then, did NFO decide to attempt to inject the NFO dairy farmer class issue back into this case.

The record shows that NFO and NFO class claimants never attempted to appeal this Court's March 8, 1974 order denying their class action motion. Indeed, those parties now attempt to argue that no procedure was available under which the NFO class claimants could appeal that order. We turn now to that question.

VI.

NFO and NFO class claimants may well have concluded that it would have been a waste of time for them to have sought appellate review of this Court's refusal to certify its class action denial for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). For *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir.), *cert. denied*, 424 U.S. 950, 96 S.Ct. 1421, 47 L.Ed.2d

356 (1976), applied well established principles of law when it refused to consider, in a mandamus proceeding, the question of whether a district Court had or had not properly refused to certify an appeal of an interlocutory order pursuant to Section 1292(b). In footnote 4 on page 614 the Court of Appeals stated the following:

> The defendants also challenge the propriety of the district court's refusal to certify this question under § 1292(b). This court is without jurisdiction to review an exercise of the district court's discretion in refusing such certification. *See United States v. 687.30 Acres of Land*, 451 F.2d 667 (8th Cir.1971), *cert. denied sub nom., Winnebago Tribe v. United States*, 405 U.S. 1026, 92 S.Ct. 1291, 31 L.Ed.2d 486 (1972) [additional citations omitted].

United States v. 687.30 Acres of Land stated the following in regard to whether the Court of Appeals has jurisdiction over an appeal from a district court's denial of a Section 1292(b) certificate:

> Twenty-eight U.S.C.A. § 1292(b) permits the trial court to certify an issue for determination on an interlocutory appeal upon the basis of findings specified by the statute. If such certification is made by the trial court, the Court of Appeals in its discretion may permit an interlocutory appeal. The Tribe sought a § 1292(b) certification which was denied by the trial court in the February 3 order. The Tribe urges that the trial court abused its discretion in denying the certification. *We have no jurisdiction to review the trial court's denial of the § 1292(b) certificate.* (Emphasis ours).

(451 F.2d at 669-670.)

The interlocutory appeal was accordingly denied in *687.30 Acres of Land* for the reason that the record showed that the district court's rulings were "clearly interlocutory and are not appealable," in the absence of a § 1292(b) certification. The Court of Appeals, however, added that "[o]f course all interlocutory rulings are subject to review upon appeal from final judgment." (451 F.2d at 670).

[22] Neither NFO nor NFO class claimants attempted to avail themselves of their right, after final judgment, to seek review of this Court's interlocutory order denying their class action motion. We find and conclude that their argument that they could not appeal that order is untenable and does not answer defendants' arguments *res judicata* and law of the case arguments.

When the Court of Appeals refused to permit this Court, by writ of mandamus, to reopen the record to receive additional available relevant evidence on the issue of the amount of plaintiff's damages in that relatively simple antitrust case, it stated that:

> It may not be inappropriate to recall here the reminder made by the Supreme Court in *Stoll v. Gottlieb*, 305 U.S. 165, 172, 59 S.Ct. 134, 138, 83 L.Ed. 104 [(1938)], that "It is just as important that there should be a place to end as that there should be a place to begin litigation."

(364 F.2d at 35).

[23] NFO tried this case in this Court and argued its appeal in the Court of Appeals on the theory that NFO, rather than the NFO dairy farmers, were entitled to recover any and all damages that may have been suffered as a result of defendants' actions.

It was only after the Court of Appeals sustained defendants' standing argument to the limited extent of stating that it was the individual farmers, and not NFO, that may have "directly suffered price reduction damages" did NFO attempt to revive, after remand, and without any effort to reopen the record, its claim that a NFO dairy farmer class action should be certified.

We are reasonably satisfied that if the Court of Appeals wanted this Court to consider at this late date the question of whether a NFO dairy farmer class should be certified after remand that it would have given reasonably clear and specific directions to this Court to have done so. The Court

of Appeals did not do so. The reminder made by the Court of Appeals in *Arthur Murray I* would seem to be appropriate to the efforts made to have a NFO dairy farmer class certified at this late date in this already excessively long litigation.

Even if the place to end this phase of the litigation has not been reached, we state our separate and alternative reasons for our denial of the pending post-remand motion to certify a NFO dairy farmer class in this case in the next section of memorandum opinion.

VII.

[24] The record in this case establishes that NFO did not know, and therefore could not prove what dairy farmers may have been NFO members during the relevant time that price reductions may have occurred. Nor has NFO ever attempted to allege or to prove or, more important, has never suggested that it would ever be in a position to prove what milk any particular NFO dairy farmer may have shipped at any particular time.

NFO and NFO class claimants, of course, argue that some sort of an "aggregate damage award" should be awarded the NFO dairy farmers on the basis of exactly the same evidence offered by NFO, the corporation, to support the price reduction claim made by it throughout the course of this litigation.

We believe that no class may properly be certified in this case for reasons similar to those stated by Chief Judge Latchum in *Al Barnett & Son, Inc. v. Outboard Marine Corporation*, 64 F.R.D. 43 (Del.1974); when he refused to certify a Rule 23(b)(3) class action in that case. After a careful analysis of the nature of that antitrust case, Judge Latchum stated that: "It is quite clear at this point that the present class action involves numerous highly individualistic factual and legal issues relating to the fact of *and amount of damages* as to each member of the proposed class

which predominate over the very limited common questions of law and fact." (Emphasis ours). (64 F.R.D. at 54).

Outboard Marine properly recognized that (1) the fact of damage and (2) the amount of damage in an antitrust case present separate and independent questions. Even if it be assumed that the *fact* of price reduction damage may be said to have been determined by the Court of Appeals' decision, the separate question of the *amount* of damage suffered by each dairy farmer remains in the case. Plaintiffs in *Outboard Marine* made substantially the same "aggregate damage award" argument as that belatedly presented in this case. Judge Latchum noted that: "The named plaintiffs and the *amicus* suggest that all of these numerous and individual issues relating to the fact of damages *and amount of damage* could be easily handled in a class suit by a collective or fluid type of recovery based on average profits or average awards to the class members." (Emphasis ours). (64 F.R.D. at 55).

Outboard Marine concluded, however, that plaintiff's theory must be rejected for the reason that:

> [I]t has been pointed out that individual questions arising from damage claims can not be solved by allowing damages in a treble damage antitrust case in the form of a fluid recovery because average awards erode due process. *Eisen v. Carlisle & Jacquelin,* 479 F.2d 1005, 1013-1014 (C.A.2, 1973)[15]; *In re Hotel Telephone Charges,* 500 F.2d 86 (C.A.9, 1974).

(64 F.R.D. at 55).

Footnote 15 stated that:

> [15]The Supreme Court in reviewing the *Eisen* case left standing that part of the Court of Appeals decision which discussed the impropriety of so-called fluid recoveries. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

(64 F.R.D. at 55 n. 15).

Outboard Marine, we believe properly held that:

> It is this Court's judgment that the limited number of common issues of fact and law which exist do not predominate in this case over the numerous factual and legal issues which can only be determined on an individual basis. Accordingly, the Court finds that the "predominance" requirement of Rule 23(b)(3) has not been met.[63]

(64 F.R.D. at 56).

This Court made an express finding, which the Court of Appeals did not find to be clearly erroneous, that no one suffered any price reduction damages in regard to any milk that might have been sold on Order 30. We found in paragraph 1375 that:

> 1375. Any Wisconsin Grade A milk that NFO did not deliver to Order 30 bottling plants, including Wanzer, was sold to Wisconsin manufacturing plants generally, at prices which returned more money per cwt. to the NFO dairy farmer member than if that milk had been sold to Wanzer.

(510 F.Supp. at 484).

No showing has been made that any of the named NFO class representatives ever had any of their milk shipped to any of the other orders in which alleged price reduction damages were allegedly suffered by other unnamed NFO farmers. Nor have NFO or the NFO class claimants ever suggested that they knew the name of any NFO dairy farmer who allegedly suffered a direct loss as a result of any price reduction. A substantial additional question is pre-

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[63] *Outboard Marine* also, we believe, properly concluded that "[t]he individual issues relating to each absent class member, even if the members were known with any certainty, would require a plethora of mini-trials within an overall mammoth case. The unmanageability of a case with such diverse individualistic issues would be further complicated to the point of incomprehensibility by jury problems." (64 F.R.D. at 57).

sented as to whether appropriate class representatives have been properly suggested under all the circumstances.

We expressly find and conclude as a separate and alternate ground for denying the pending post-remand motion to certify a class of NFO dairy farmers that NFO and NFO class claimants have not carried the burden of establishing that a Rule 23(b)(3) class action should be certified under the circumstances of this case. It is therefore

ORDERED that the pending motion to certify a NFO dairy farmer class should be and the same is hereby denied.

NFO'S MOTION FOR INTEREST ON COURT OF APPEALS AWARD OF ATTORNEYS' FEES AND COSTS[64]

I.

On September 1, 1983, NFO filed its pending motion in this Court for interest on the Court of Appeals' award of attorneys' fees and costs on appeal. That motion was allegedly filed "pursuant to Federal Rule of Civil Procedure 54(b), section 4 of the Clayton Act, 15 U.S.C. § 15, and 28 U.S.C. § 1961" and alleged that the rate of interest should be calculated at 9 percent per year in accordance with Missouri Revised Statutes § 408.040 (1979).

NFO's motion also alleged that the "interest began to accrue on August 31, 1982, the date the Eighth Circuit issued its opinion, which unconditionally established NFO's right to the award." NFO, in its suggestions in reply to defendants' suggestions in opposition to its pending motion, in reliance upon the Eighth Circuit's opinion in *R.W.T. v. Dalton*, 712 F.2d 1225, 1234 (8th Cir.1983), contends that "interest should be assessed based on the August 31, 1982

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[64]This tenth and final issue was submitted on briefs filed and without oral argument.

judgment at the rate of 12.4%, rather than 9% as indicated earlier."

The defendants' suggestions in opposition to NFO's pending motion point out that they requested and received an order from the Court of Appeals staying the issuance of the mandate pending the disposition of their petitions for certiorari; that upon denial of the petitions, the Court of Appeals issued its mandate on May 27, 1982; that judgment was entered in accordance with that mandate in this Court on May 31, 1982; and that Mid-Am, AMPI, and CMPC paid their portions of the principal amount of $163,968.15 on July 13, 14, and 15, 1982, respectively.

The defendants' brief states that "defendants do not dispute that NFO is entitled to the attorneys' fees, costs and expenses awarded, but request this Court to rule on the NFO motion that interest on those items is allowable only from May 31, 1983, the day on which this Court entered its judgment, up to and including the date immediately preceding the date each party paid its portion of these costs to NFO."

Defendants concede that the 1982 amendment to 28 U.S.C. § 1961 became effective October 1, 1982, prior to this Court's entry of judgment on May 31, 1983, and that under the formula provided in the amended statute, this Court should order the defendants to pay interest at the rate of 8.72% from May 31, 1982, until the date immediately preceding the day each of the defendants paid their portion of the judgment. Defendants argue that any order entered by this Court that would provide for interest to accrue prior to this Court's May 31, 1983 judgment would contravene the Supreme Court's decision in *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948) as now codified in Rule 37, Federal Rules of Appellate Procedure.

We are satisfied for the reasons we shall state that an order should be entered that will provide that defendants

shall pay interest at the rate of 8.72% from May 31, 1983 until the date immediately preceding the day of each defendant's payment of its respective portion of the judgment entered by the Court in accordance with the Court of Appeals mandate.

II.

The files and records in this Court and in the Court of Appeals show that on December 13, 1982 the Court of Appeals entered an order awarding NFO a total of $163,968.15 for attorneys' fees, expenses, and court costs on appeal. That order is published in full in *Alexander v. National Farmers Organization,* 696 F.2d 1210 (8th Cir.1982).

Those files and records further show that on May 27, 1983 the Clerk of the Court of Appeals forwarded to the Clerk of this Court the mandate of the Court of Appeals in the three appeals, Nos. 81-1235/36/37, which had been decided by the Court of Appeals on August 31, 1982, the opinion of that Court being reported in 687 F.2d 1173. That mandate, in accordance with Rule 41(a) of the Federal Rules of Appellate Procedure, consisted of "a certified copy of the judgment and a copy of the opinion of the court." The May 27, 1982 letter from the Clerk of the Court of Appeals to the Clerk of this Court carried a postscript which stated:

> P.S. Enclosed is certified copy of order which relates to costs and attorneys fees. Copy of order is also enclosed to each of counsel.

That postscript, of course, referred to and the letter enclosed a certified copy of the Court of Appeals order of December 13, 1982 awarding costs and attorneys' fees which, as above stated, was published in 696 F.2d 1210.

The Court of Appeals, however, did not direct that any additional mandate issue other than that transmitted by its Clerk's letter of May 27, 1982. The May 27, 1982 mandate of the Court of Appeals did not contain any "instructions with

respect to allowance of interest" as contemplated by the last sentence of Rule 37 of the Federal Rules of Appellate Procedure.

Or. May 31, 1982, the day the Clerk of this Court received the mandate from the Court of Appeals, judgment in accordance with that mandate was entered in this Court. The judgment of this Court, of course, did not include any allowance of interest on the attorneys' fees and costs awarded NFO by the Court of Appeals in its December 13, 1982 order.

The record is clear that NFO did not file a timely petition for rehearing after the Court of Appeals entered its December 13, 1982 order awarding costs and attorneys' fees, in accordance with the rule stated in *Riha v. International Tel. & Tel. Corp.*, 533 F.2d 1053 (8th Cir.1976). *Riha* stated that: "Rule 37 provided a simple and plain basis for plaintiff to have requested by petition for rehearing prior to the issuance of our mandate explicit 'instructions with respect to the allowance of interest.' " *Riha, supra,* 533 F.2d at 1055. Nor has NFO ever filed a motion to recall mandate at any time after that mandate was issued by the Court of Appeals on May 27, 1982.

III.

Both sides cite and rely on the Ninth Circuit's decision in *Perkins v. Standard Oil Company of California,* 487 F.2d 672 (9th Cir.1973) to support their respective positions. It is obvious that the parties are not in agreement as to what *Perkins* actually held. The Eighth Circuit has cited and approved *Perkins* in two recent cases. See *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1218 (8th Cir.1981), and *R.W.T. v. Dalton,* 712 F.2d 1225, 1234 (8th Cir.) *cert. denied,* ——U.S.——, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983). We accordingly believe that the rationale of *Perkins* is applicable to the question presented by NFO's pending motion.

It is to be noted that the request considered in *Perkins* was filed directly in the Court of Appeals rather than by motion filed in the district court. It is thus obvious that the Ninth Circuit view of Rule 37 of the Federal Rules of Appellate Procedure is consistent with the view stated by the Eighth Circuit in *Riha v. International Tel. & Tel. Corp., supra.*

The Ninth Circuit in *Perkins* noted at the outset of its decision that both parties had, acting pursuant to Rule 37, requested that court's "instructions" with respect to the allowance of interest on certain awards of attorneys' fees. An earlier appeal in *Perkins,* reported in 474 F.2d 549 (9th Cir.1973), shows that the Ninth Circuit had (1) reduced the district court's original $250,000 award to $116,562; (2) reduced another award made in the district court in the amount of $25,000 to $11,680; (3) affirmed still another award made by the district court in the amount of $14,180 and; (4) most important for purposes of ruling NFO's pending motion, the Court of Appeals allowed the plaintiff an additional award of $1,500 for services performed by plaintiff's counsel on appeal. The Ninth Circuit recognized in its decision reported in 487 F.2d at 674 that the mandate issued following its February 12, 1973 decision on the earlier appeal (reported in 474 F.2d 549) "did not include instructions with respect to the allowance of interest on any of the [four] awards."

Certiorari was applied for in *Perkins* but denied on June 11, 1973. No stay of mandate was granted pending certiorari. The Ninth Circuit's mandate was accordingly issued on March 5, 1973 in accordance with Rule 41, Federal Rules of Appellate Procedure. On July 3, 1973, the defendant paid the principal amount of the two reduced judgments, paid the principal amount of the $1,500 awarded by the Court of Appeals, and paid the principal and interest on the one district court award which had been affirmed.

The defendant in *Perkins* contended that the Ninth Circuit should follow the Seventh Circuit's decision in *Harris v. Chicago Great Western Ry.*, 197 F.2d 829 (7th Cir. 1952), and compute the interest from June 11, 1973, the date the Supreme Court denied certiorari. Plaintiff, on the other hand, contended that interest on the two reduced district court awards should be computed from January 26, 1971, the date of the entry of the district court's original award, and that interest on the $1,500 award made by the Court of Appeals should be computed from February 12, 1973, the date the Court of Appeals filed its opinion in 474 F.2d 549.

Perkins held that interest on the two reduced district court awards should be accrued from the date of the district court's original judgments. *Perkins,* however, rejected plaintiff's contention in regard to the award made by the Court of Appeals and concluded that because "the $1,500 award authorized by our decision . . . represented services which had not yet been performed at the time of the district court's original judgment [we] conclude that interest on that award should commence to run on the date of issuance of our mandate; i.e. March 5, 1973." 487 F.2d at 676. The Court of Appeals accordingly amended its mandate to include such instructions as required by Rule 37 of the Federal Rules of Appellate Procedure.

Perkins' conclusion, quoted with approval by the Eighth Circuit in *R.W.T. v. Dalton,* 712 F.2d at 1234, that "there exists no real distinction between judgments for attorneys' fees and judgments for other items of damages" does not answer the question presented in this case. *Perkins'* recognition that a Court of Appeals has "the power to recall and amend our mandate" and its citation of *Briggs v. Pennsylvania, supra,* established the Ninth Circuit's familiarity with the "mandate" rule of that Supreme Court case. The Notes of the Advisory Committee on Appellate Rules stated the following in regard to Rule 37:

> In *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948), the Court held that where the mandate of the court of appeals directed entry of judgment upon a verdict but made no mention of interest from the date of the verdict to the date of the entry of the judgment directed by the mandate, the district court was powerless to add such interest.

The Notes added that "the second sentence of the proposed rule is a reminder to the court, the clerk, and counsel of the *Briggs* rule" and concluded by stating that:

> Since the rule directs that the matter of interest be disposed of by the mandate, in cases where interest is simply overlooked, a party who conceives himself entitled to interest from a date other than the date of entry of judgment in accordance with the mandate should be entitled to seek recall of the mandate for determination of the question.

Clymore v. Far-Mar-Co., Inc., 709 F.2d 499, 505 (8th Cir.1983), is a recent example of the manner in which the Eighth Circuit will consider and give instructions in accordance with Rule 37 to the district court with respect to the allowance of interest on awards for attorneys' fees and expenses.

NFO's primary reliance on the per curiam opinion of the Fifth Circuit en banc in *Cooper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir.1983) is untenable. For that case did no more than reflect the Fifth Circuit's conclusion that the rationale of the Ninth Circuit's opinion in *Perkins* should be followed and that an earlier Fifth Circuit divisional decision, *Carpa v. Ward Foods*, 567 F.2d 1316 (5th Cir.1978), which expressly refused to follow *Perkins*, should be overruled.

Reeves v. International Tel. & Tel. Corp., 705 F.2d 750 (5th Cir.1983), decided shortly after *Cooper Liquor, Inc.*, reflects the Fifth Circuit's correct view that a district court may not properly allow interest on a judgment unless instructed to do so by the mandate of the Court of Appeals in accordance

with Rule 37, Federal Rules of Appellate Procedure. The opening paragraph in *Reeves* appropriately stated the following:

> In our earlier opinion in this case, we increased the amount of the district court award but did not mention interest. Reeves then sought interest in the district court, which, *properly following our mandate,* denied relief. Now Reeves once again appeals. The district court decision is correct, and it is affirmed. (Emphasis ours). (Footnotes omitted).

Reeves, supra, 705 F.2d at 751.

Although the mandate of the Court of Appeals in the first *Reeves* appeal was issued in July 1980, the Court of Appeals determined that in spite of the fact the plaintiff sought interest in the wrong court almost three years after the mandate had issued in regard to that appeal, his appeal from the district court's later order, which properly denied interest, could and should nevertheless be treated as a "not unforgiveably belated request for proper relief." Specifically the Fifth Circuit held in the 1983 appeal that:

> Although Reeves incorrectly pursued his claim in the district court, rather than seeking relaxation of our mandate, he did promptly seek a judicial determination of the interest question. We see no reason to penalize him for his procedural mistake. Therefore, we modify our original mandate to allow interest on the full award from the date of the original district court judgment. (Footnote omitted).

Reeves, supra, 705 F.2d at 752-53.

Plaintiff apparently then asked the Fifth Circuit what it had done for him lately. For it is clear that the Fifth Circuit concluded that it had done enough under the circumstances. The last paragraph of the Fifth Circuit's opinion in *Reeves* tells that story:

> Finally, Reeves seeks attorneys' fees for the prosecution of the interest claim. The claim could have speedily been presented and disposed of had Reeves's counsel

> followed the correct course by petitioning for correction of our mandate. Because we affirm the judgment below, we allow no fees for counsel's efforts in the district court or on appeal.

(*Id.* at 753).

IV.

[25] We are satisfied that this Court properly followed the mandate of the Court of Appeals when judgment was entered for the total amount of $163,968.15 on May 31, 1983 in accordance with that Court's December 13, 1982 Order. We are further satisfied that under the mandate rule of *Briggs* this Court does not have power to enter judgment for an amount different from that directed in the Court of Appeals' mandate. That mandate contained no instructions with respect to interest as contemplated by Rule 37 of the Federal Rules of Appellate Procedure.

[26] The cases we have discussed, particularly the Fifth Circuit's recent decision in *Reeves,* suggest that if the Eighth Circuit's failure to include instructions in regard to interest in its mandate was a matter of oversight, that Court has power and jurisdiction to correct any such inadvertent omission by treating an appeal from this Court's order denying NFO's motion as a belated request for proper relief in the Court of Appeals to seek a change in the mandate of that court.

[27] For the reasons stated, this Court will enter an order allowing interest from May 31, 1983 at the rate of 8.72% to the date immediately preceding the day each defendant paid its portion of the May 31, 1983 judgment entered by this Court.

[28] That order will, of course, reflect our rejection of NFO's claim that the rate of interest to be allowed on this Court's judgment should be 12.41% under section 1961, as amended. The Clerk's office has advised that the average accepted auction price of the appropriate United States

Treasury bills prior to the date of this Court's May 31, 1983 judgment resulted in the 8.72% rate of interest to be included in the order.

Accordingly, it is

ORDERED (1) NFO's motion for interest on award of attorneys' fees and costs on appeal, should be and is hereby denied. It is further

ORDERED (2) that defendants CMPC, Mid-Am and AMPI are ordered to pay interest at the rate of 8.72% on their respective portions of the Court of Appeals' $163,968.15 award from May 31, 1983, the date this Court entered judgment in accordance with the Court of Appeals' mandate, until the date immediately preceding the day each defendant paid its portion of the $163,968.15 award to NFO.

ORDERS DIRECTING FURTHER PROCEEDINGS

Our discussion of Issue No. 8—Costs, made clear that the Clerk cannot presently be directed to enter any final judgment at this stage of the post-remand proceedings. That discussion also made clear that this Court would follow the admonition stated by the Court of Appeals in *Obin v. Dist. No. 9 of Inter. Assn., supra,* and that, accordingly, it would delay the entry of all judgments on the merits until after all questions of attorneys' fee claims had been determined so that a single final judgment could be entered which would determine all issues presented on remand.

The Court approved the provisions made in paragraph 8 of the post-oral argument order under which the parties agreed to "meet and confer in an attempt to reach agreement on the items contained in NFO's petition for costs." Paragraph 10 of that order reflects this Court's approval of counsels' agreement that they would also attempt to agree upon an "allocation formula or other reasonable resolution

[of the issues posed] by NFO's request for Rule 37, Phase III fees and costs, together with NFO's request for undifferentiated costs for Phase I, II, and III as set forth in its cost petition."

Experience with the minimal procedure steps provided in the May 31, 1984 order under which counsel were to conduct their negotiations to reach agreement establishes that this Court's orders directing further proceedings that must be issued at the present time must contain more detailed procedural steps under which counsels' future negotiations are to be conducted than were contained in the March 31, 1984 order.

The fact that the minimal procedures provided in the May 31, 1984 order were inadequate for the successful negotiation of the costs issue establishes that those procedures would not be adequate to provide an appropriate method under which the more difficult problems of reaching an agreement in regard to the amount of attorneys' fees to be awarded that must be determined before final judgment may be entered in this case.

The files and records in *Rainsbarger v. Columbia Glass Co.*, 600 F.Supp. 299 (1984) to which we earlier directed attention, for example, show that applications for fees of three law firms were filed in that case. One firm sought an attorneys' award of $61,294.85 (plus an enhancement claim). The other two firms sought awards of $24,453 and $3,660, respectively. Compliance with detailed orders entered in that case, entered both before and after "two lengthy conferences with counsel" (*Rainsbarger, supra,* 600 F.Supp. at 304), produced an agreement that a total amount of $33,900 should be awarded all three firms.[65] Thus this

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[65]The agreement of the three law firms in *Rainsbarger* to reduce their total attorneys' fee applications from a total of $89,407.85 to an agreed total amount of $33,900 was undoubtedly due to the fact that at the conferences between the Court and

Court, under the unusual factual circumstances presented in *Rainsbarger,* was required only to decide how the total agreed amount of $33,900 was to be divided between the three law firms that sought separate attorneys' fee awards.

The further proceedings directed in *Rainsbarger* are not appropriate for this case. For every case, and particularly this case, presents its own unique factual circumstances. It is therefore proper that we enter orders which, as a first step, will seek the cooperation and suggestions of counsel, in order that further proceedings may be directed to attain the ideal stated in *Hensley* that "litigants will settle the amount of a fee."

We believe that it is obvious that the time has come for NFO, in accordance with paragraph 12 of the May 31, 1984 order, to file its motion for Clayton Act attorneys' fees. Counsels' initial recommendations in regard to the direction of further proceedings shall therefore include a date on which NFO's motions will be filed. Counsels' ultimate recommendations shall also include the detailed negotiation steps that they will agree to take in regard to that

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counsel, "[c]ounsels' attention was . . . directed to the fact that the notion expressed in various briefs filed by plaintiffs' counsel that attorneys' fees were to be automatically awarded for all hours expended on a particular case, regardless of the result obtained, had . . . been expressly rejected by the Supreme Court in *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Specific attention was directed to the Supreme Court's conclusion stated in that case that 'the extent of a plaintiff's success is a crucial factor in determining the proper amount of award of attorneys' fees' and its statement that the 'degree of success obtained [is] the most critical factor to be evaluated.' " (*Id.* at 304). The Supreme Court, in a different context, quoted "the most critical factor" and other important language of *Hensley* with approval in *Marek v. Chesney,* ——U.S.——, 105 S.Ct. 3012, 87 L.Ed.2d 396 (1985). The principles stated in *Hensley* are, of course, applicable to this case.

motion and in regard to all the other negotiations that must be conducted in connection with all the other questions presented in regard to the amount of attorneys' fees and costs to be awarded pursuant to the orders entered in this memorandum opinion.

The Court is satisfied that all counsel recognize that a much more detailed negotiation procedure must be directed than that which was provided in the May 31, 1984 order, else the numerous requests for attorneys' fees will, contrary to *Hensley's* admonition, "result in a second major litigation." The Court, of course, stands ready to confer with counsel as it may be requested in order that effective procedures be established under which agreed orders directing further proceedings may be entered.

For the reasons stated, it is

ORDERED (1) that the Clerk shall not enter any final judgments in this case pursuant to Rule 58 of the Federal Rules of Civil Procedure until further order of Court. It is further

ORDERED (2) that on or before July 22, 1985 counsel for the parties shall meet and confer at an across-the-table conference for (1) the purpose of agreeing upon (a) the date NFO's motion for Clayton Act attorneys' fees will be filed, (b) the date upon which NFO will file its claims under the orders entered in regard to Issue No. 2, and (c) the date AMPI's Issue 3 cost petition will be filed and (2) for the purpose of agreeing upon the form of orders directing further proceedings which they recommend this Court should enter under the circumstances. It is further

ORDERED (3) that on or before July 31, 1985 counsel for the parties shall file a joint report, signed by all counsel, which, hopefully, will jointly recommend the form of orders directing further proceedings to be entered by this Court.

Should counsel be unable to reach total agreement in regard to their recommendations, (1) a joint report shall be

filed which sets forth the items upon which counsel are in agreement and (2) separate reports shall be separately filed by the parties which will set forth the recommendations that such parties have suggested but which were not agreed to by opposing counsel. It is further

ORDERED (4) that, in recognition of the complexity of the problems presented and the fact that vacation schedules may present additional problems, the parties may agree upon an extension of the time schedule stated in Orders (2) and (3) and submit a new time schedule for approval of the Court. It is further

ORDERED (5) that if counsel feel the need for any further or more detailed explanation of the purpose of the orders above entered, the Court, if requested, will be happy to convene a conference with counsel at a time convenient for the Court and all counsel in the case.

NFO II

(682 F.2d 1173)

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1235

ROBERT B. ALEXANDER, *et al*,

v.

NATIONAL FARMERS ORGANIZATION,

Appellant,

v.

ASSOCIATED MILK PRODUCERS, INC.,
MID-AMERICA DAIRYMEN, ASSOCIATED
RESERVE STANDBY POOL COOPERATIVE,

Appellees.

WESLEY JOHNSON, GARY HANMAN,
HAROLD S. NELSON and DAVID PARR,
CENTRAL MILK PRODUCERS COOPERATIVE,

Appellee.

No. 81-1236

ROBERT B. ALEXANDER, *et al*,

v.

NATIONAL FARMERS ORGANIZATION,

Appellee,

v.

ASSOCIATED MILK PRODUCERS, INC.,

Appellant.

MID-AMERICA DAIRYMEN, ASSOCIATED
RESERVE STANDBY POOL COOPERATIVE;
WESLEY JOHNSON; GARY HANMAN;
HAROLD S. NELSON; DAVID PARR;
CENTRAL MILK PRODUCERS COOPERATIVE.

No. 81-1237

ROBERT B. ALEXANDER, *et al*,

v.

NATIONAL FARMERS ORGANIZATION,

Appellee,

v.

ASSOCIATED MILK PRODUCERS, INC.,
MID-AMERICA DAIRYMEN, INC.,

Appellant.

ASSOCIATED RESERVE STANDBY POOL COOPERATIVE; WESLEY JOHNSON; GARY HANMAN; HAROLD S. NELSON; DAVID PARR; CENTRAL MILK PRODUCERS COOPERATIVE.

Submitted: November 11, 1981
Filed: August 31, 1982

Before HEANEY and MCMILLIAN, Circuit Judges, and BENSON,* Chief Judge.

HEANEY, Circuit Judge.

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*The Honorable PAUL BENSON, Chief Judge, United States District Court for the District of North Dakota, sitting by designation.

This case involves reciprocal antitrust actions arising out of the often fierce competition in the Midwest milk industry during the late 1960's and early 1970's. The actions were tried in three phases, generating an extensive record more than 15,000 pages in length. *See In Re Midwest Milk Monopolization Litigation*, 510 F.Supp. 381 (W.D. Mo. 1981)(hereinafter *Midwest Milk*). The district court[1] found that none of the parties presented sufficient evidence to meet their respective burdens of proof and, therefore, denied relief on all substantive claims.

We affirm the district court's conclusion that NFO has not violated the antitrust laws. NFO dairy organizing and marketing efforts fall within the Capper-Volstead exemption which permits farmers to band together for the purpose of collectively marketing their products.

With respect to NFO's claims against Mid-America Dairymen, Inc. (Mid-Am), Associated Milk Producers, Inc. (AMPI), Central Milk Producers Cooperative (CMPC) and Associated Reserve Standby Pool Cooperative (ARSPC), we affirm in part and reserve in part. Mid-Am, AMPI and CMPC did conspire to monopolize milk and eliminate competition through the use of predatory, anticompetitive and unlawful tactics. Such conduct falls outside the Capper-Volstead exemption and violates Sections 1 and 2 of the Sherman Act. The contrary conclusion below is reversed and the case is remanded for a determination of the amount of damages NFO may recover. We affirm the dismissal of NFO's claim against ARSPC because the evidence does not establish that this entity participated in the unlawful conspiracy.

I.

Factual Background And Governing Law

The structure of supply and pricing in the Midwest milk industry may be summarized as follows. Minnesota, Wisconsin

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[1] The Honorable John W. Oliver, Senior Judge, United States District Court for the Western District of Missouri.

and part of Southwest Missouri are the principal areas of surplus production, accounting for approximately twenty-five percent of the nation's total milk production. These areas supply milk to the midwest region and to regional markets in the south, southwest and southeast. Milk production is highest in the spring and early summer, while demand for fluid milk products is usually highest in the fall. Thus, some reserve capacity is generally necessary to balance fluctuations between supply and demand.

Grade A milk is that milk which is approved for sale as fluid milk for human consumption (Class I products) and is produced under stricter sanitary conditions than Grade B milk, which may be used only for manufactured products such as cheese and butter (Class II products). Thus, only Grade A may be used for Class I products, while both Grades A and B may be used for Class II products. The USDA regulates the minimum price paid for Grade A milk, which is based upon a "blend price" formula that accounts for the proportion of given milk allocated to Class I and Class II uses in any given market order.[2] Class I uses command a higher price to compensate producers for the added cost of producing milk for such uses and to ensure an adequate supply of wholesome fluid milk. Class I price is not the same in each regulated local market, however. The minimum price for such milk generally increases from north to south, in part to reflect the transportation cost of shipping from the surplus areas of Minnesota and Wisconsin to the more distant markets.

Individual dairy farmers have too little market power to affect the price paid for their milk. *Midwest Milk*, *supra*, 510 F. Supp. at 443. By representing numerous farmers, however, dairy cooperatives may achieve higher prices for their mem-

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[2] A federal market order is a geographic area defined as a market by the USDA and is suject to minimum price and other regulation under a market administrator. The greater Chicago area, for example, is a Federal Market Order (Order 30).

bers (called a "premium" when it exceeds the minimum federal order price) and this, of course, is a major purpose of such co-ops. It is the competition between the National Farmer's Organization (NFO) and certain of the large midwest co-ops which forms the basis of this action.

NFO was formed in 1955 as a nonprofit corporation to engage in protest, lobbying and organizing activities on behalf of farmers. Since 1957, it has also engaged in collective bargaining on behalf of farmers, the principal aim of which is to improve farm income by raising the commodity prices paid to farmers. In the 1960's, NFO pursued a series of programs aimed specifically at the dairy industry—including efforts to establish a common marketing agency, to bargain collectively with established dairy co-ops and, finally, to directly market dairy products. These programs generally were not supported by the large, established dairy cooperatives. Particularly from 1969 onward (when NFO commenced its direct marketing efforts), NFO and the established co-ops became vigorous competitors in the marketing of raw Grade A milk produced in the midwest.

The late 1960's were also marked by a massive consolidation of many midwestern co-ops into a few, larger cooperatives. Mid-American Dairymen, Inc. (Mid-Am) was formed in 1968, ultimately combining what earlier had been more than sixty independent co-ops and dairies from across the midwest.[3] Associated Milk Producers, Inc. (AMPI) was formed in 1969 and is comprised of more than seventy such entities. Central Milk Producers Cooperative (CMPC) is a federation of co-ops, including AMPI, which supplies milk solely to the Chicago

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[3] The merged co-ops include Square Deal Milk Producers of Highland, Illinois; Mid-America Dairymen of Kansas City, Missouri; Twin Cities Milk Producers of St. Paul, Minnesota; Producers Creamery of Springfield, Missouri; Sanitary Milk Producers of St. Louis, Missouri; and Producers Creamery of Chillicothe, Missouri. *See Midwest Milk, supra,* 510 F.Supp. at 443-448.

market. Associated Reserve Standby Pool Cooperative (ARSPC) is also a cooperative federation, including Mid-Am and AMPI as members, engaged in standby pooling operations with its members and with certain proprietary dairies.

The pattern of consolidation and use of certain marketing practices led the Justice Department to sue both Mid-Am and AMPI for antitrust violations, matters which were settled by consent decrees.[4] They are not significant here except insofar as such decrees may affect any claim by NFO for injunctive relief.[5]

The present case is a private antitrust action. It began in 1971 when Mid-Am filed several claims against NFO, of which essentially two remain on appeal: that NFO violated Section 1 of the Sherman Act and Section 4 of the Clayton Act by (1) engaging in illegal price-fixing with respect to marketing of milk, and (2) promoting a group boycott of Mid-Am by enlisting Mid-Am members to breach their contracts and refuse to deal with Mid-Am. NFO counterclaimed against Mid-Am, AMPI, CMPC and ARSPC, alleging unlawful monopolization, attempted monopolization and conspiracy to monopolize milk marketing and to unlawfully eliminate NFO as a competitor.

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[4] *See United States* v. *AMPI*, 394 F.Supp. 29 (W.D. Mo. 1975); *United States* v. *Mid-Am, Inc.*, 1977-1 Trade Cases ¶ 61,508 (1977). Both the public and private antitrust actions were conducted before the Honorable John W. Oliver, Senior Judge, United States District Court for the Western District of Missouri.

[5] Part of NFO's claim is based, for example, upon allegedly predatory acquisitions by AMPI. Under the consent decree, AMPI is enjoined from making certain acquisitions without Justice Department approval. *See United States* v. *AMPI*, note 4, *supra*, 394 F.Supp. at 54. Moreover, in approving the consent decree, the court determined that divestiture of AMPI's acquisitions was not necessary in the public interest. *Id.* Although some conduct enjoined under the consent decree is similar to conduct complained of here, the consent decree evidences neither admission, denial nor any ultimate conclusion as to any facts at issue here.

AMPI then counterclaimed against NFO, alleging essentially the same price-fixing claims asserted by Mid-Am and alleging violations of the Agricultural Fair Practices Act as well as an illegal conspiracy to "destroy" AMPI and to monopolize milk.

The allegations of the parties include assertions of actual and attempted monopolization under Section 2 of the Sherman Act, conspiracies to monopolize under Section 2, conspiracies to eliminate competition through unlawful means under Sections 1 and 2 and certain *per se* violations under Section 1. The parties are not often clear on which factual allegations are linked to which of their legal theories, and the nature of legal liability is further complicated by the Capper-Volstead Act, 7 U.S.C. § 291, which immunizes certain activities of farm cooperatives. Before turning to the specific claims of each party, a summary of the applicable law will be helpful.

A Section 2 claim of actual monopolization generally requires, *inter alia*, a showing of monopoly power in the relevant product and geographic market. *See, e.g., United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). An attempt to monopolize claim generally requires the specific intent to monopolize and a showing of a "dangerous probability" of success, the latter of which is also examined by reference to the offender's share of the relevant market. *See, e.g., Walker Process Equip., Inc.* v. *Food Machinery & Chem. Corp.*, 382 U.S. 172, 177 (1965); *Agra Shell, Inc.* v. *Hammons Products Co.*, 479 F.2d 269, 285-287 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973).[6] The "relevant market" element is important because monopolization and attempt cases often stand or fall on the definition of the product and geographic market. *See, e.g., Von Kalinowski,*

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[6] *But see Greyhound Computer Corp.* v. *IBM Corp.*, 559 F.2d 488, 504 (9th Cir. 1977), holding that "relevant market" is not at issue in an attempted monopolization case and that a plaintiff must show only that an "appreciable amount of commerce" is involved. The Ninth Circuit's view of attempted monopolization has not been followed in this Circuit. *See Agra Shell, Inc.* v. *Hammons Prods., supra*, 479 F.2d at 287.

Antitrust Laws and Trade Regulation, §§ 8,02[3]c, 9.01[3] (1992)(collecting cases)(hereinafter, *Von Kalinowski*).

A Section 2 claim for conspiracy to monopolize, however, generally does not require proof of a relevant market, at least not in the manner required in actual and attempted monopolization cases. *Cf. United States* v. *DuPont de Nemours & Co.*, 351 U.S. 377, 395 n.23 (1956). This is because the essential elements of a Section 2 conspiracy claim are concerted action and specific intent to monopolize, such that it need only be further shown that the conspiracy affected "some appreciable part of interstate commerce." *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1971). Some commentators have argued, however, that relevant market should be considered a necessary element of Section 2 conspiracy claims, at least in civil cases. *See, e.g.*, 3 *Von Kalinowski, supra*, § 9.02[4]. In our view, a civil Section 2 conspiracy claim, standing alone, does require a minimal showing of product and geographic context—what and where the alleged conspiracy is focused—to ensure that a claim is not based upon some abstract showing of unlawful intent. The nature of such proof, however, is simply to show the context of the conspiracy. It need not be as rigorous as the relevant market showing for other Section 2 claims, because actual attainment of "dangerous probability" of monopoly power is not at issue in a conspiracy claim.

These general antitrust principles must be construed in light of the immunity afforded farm cooperatives under the Capper-Volstead Act, 7 U.S.C. § 291. Such entities are exempt from liability for price-fixing and other joint marketing efforts which seek to achieve the lawful aims of the cooperative movement, *i.e.*, collective marketing of farm products so as to improve economic conditions for individual farmers. *See, e.g.*, *Maryland & Virginia Milk Producers Assoc.* v. *United States*, 362 U.S. 458, 466 (1960). Cooperatives may combine with each other to do together what they may lawfully do individually and, hence, they cannot be conspirators to the extent their concerted action is in pursuit of legitimate aims. *See Sunkist*

Growers, Inc. v. *Winckler & Smith Citrus Products, Co.*, 370 U.S. 19 (1962) (*Sunkist I*). Similarly, cooperatives may, singly or in combination with other exempt cooperatives, obtain monopoly power in a given market so long as it is achieved through natural growth, voluntary confederation and without resort to predatory or anti-competitive practices. *E.g.*, *Fairdale Farms* v. *Yankee Milk, Inc.*, 635 F.2d 1037, 1044 (2d Cir. 1980).

Capper-Volstead provides only limited immunity and co-ops have occasionally sought to extend their market power in ways not intended by Congress. Co-ops cannot, for example, conspire or combine with nonexempt entities to fix prices or control supply, even though such activities are lawful when engaged in by co-ops alone. *See United States* v. *Borden*, 308 U.S. 188, 207-208 (1939).

Similarly, the Capper-Volstead Act "did not leave cooperatives free to * * * restrain and suppress competition with the cooperatives." *Maryland and Virginia Milk Producers Association, supra*, 362 U.S. at 467. The scope of prohibited practices has been increasingly clarified through case law.

There is no immunity, for example, for attempts to restrain competition through discriminatory pricing, *Knuth* v. *Erie-Crawford Dairy Cooperative Assoc.*, 395 F.2d 420, 424 (2d Cir. 1968); coercion of persons to join the cooperative, *Gulf Coast Shrimpers and Oystermans Assoc.* v. *United States*, 236 F.2d 658, 665 (5th Cir. 1956); predatory harassment, *Otto Milk Co.* v. *United Dairy Farmers Cooperative Association*, 388 F.2d 789, 797 (3d Cir. 1967); or illegal boycotts, *North Texas Producers Assoc.* v. *Metzger Dairies, Inc.*, 348 F.2d 189, 196 (5th Cir. 1956). In *Maryland and Virginia Milk Producers Association, supra*, 362 U.S. at 468, the Supreme Court summarized a number of "anticompetitive activities which are so far outside the 'legitimate objects' of a cooperative that, if proved, they would constitute clear violations of Section 2 of the Sherman Act." Included among such activities were a co-op's attempt to interfere with truck shipments of nonmembers' milk and its use of prior debt to influence a dairy to buy only from the co-op.

Id. Moreover, in reviewing an otherwise lawful dairy acquisition as part of an alleged attempt to eliminate competition, the same Court held that "even lawful contracts and business activities may help to make up a pattern of conduct unlawful under the Sherman Act." *Id.* at 472.

Whether a co-op's given business practice is unlawful thus is not merely a question of whether it is "predatory" in a strict sense, *e.g.*, lacking a legitimate business justification. As the Sixth Circuit recently noted, "[a]n anti-competitive practice may have economic justification, but its use may be undertaken with unlawful intent and in the desire to achieve an unlawful goal." *United States* v. *Dairymen, Inc.*, 660 F.2d 192, 195 (6th Cir. 1981). That Court squarely rejected the argument that Section 2 prohibits co-ops only from engaging in narrowly defined "predatory practices." *Id.* at 194. We agree. A cooperative may not use its position, no matter how lawfully acquired, "to stifle or smother competition." *Maryland and Virginia Milk Producers Association, supra*, 362 U.S. at 463. Where such an unlawful intent is clear, overt acts in furtherance of this purpose are not immunized simply because they might also have other justifications or because they are merely "anti-competitive" rather than "predatory."

These limited immunity principles must also be harmonized with the ordinary intent element of Section 2. Attempted monopolization and conspiracy to monopolize usually require a showing of specific intent to monopolize, *see* pp. 4-5, *supra*, but as we have noted, a cooperative may form such an intent lawfully. The impermissible aim is to pursue monopoly power by eliminating or restraining competition with the co-op through predatory or anti-competitive practices. An intent to do so is, therefore, the proper intent element of an attempted monopolization or conspiracy claim under Section 2. Of course, a conspiracy or combination to eliminate competition through such unlawful means would also violate Section 1 as an unreasonable restraint of trade. *See Maryland and Virginia Milk Producers Association, supra*, 362 U.S. at 463.

With this background in hand, we turn to the specific claims at issue.

II.

CLAIMS AGAINST NFO

A. Price-Fixing And The Capper-Volstead Exemption

Central to the antitrust claims of Mid-Am and AMPI is the contention that a number of NFO programs constituted horizontal price-fixing, a *per se* violation of the Sherman Act unless exempt. *See, e.g., United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Mid-Am and AMPI further argue that NFO cannot claim the Capper-Volstead exemption, principally because a small number of non-farmers were nominal members of NFO during certain periods at issue here.

The district court did not rule on the Capper-Volstead question because it concluded that NFO's activities did not constitute price-fixing. *Midwest Milk, supra*, 510 F.Supp. at 423-426. We cannot agree with this conclusion. In reviewing the district court's decision, we note that most of the relevant facts are not in dispute. The parties stipulated to 3,206 facts with respect to Mid-Am's Phase I claims against NFO and the district court noted: "[T]he real disputes in regard to Phase 1 * * * present legal questions and relate, on the facts, to questions of what inferences should be drawn from stipulated and undisputed underlying factual circumstances." *Id.* at 386.

The stipulated facts are that, initially, NFO did not market milk at all, but instead promoted a common marketing agency for co-ops and individual farmers—an organization that could bargain more effectively by collectively representing a larger share of milk producers. NFO later presented "Master Contracts" to cooperatives which, by their terms, would be activated once sixty percent of the milk supply in a particular area was subject to such agreements. One purpose of the Master Contracts was to enable NFO to bargain for the price paid to producers for their milk. These Master Contracts were never activated, however, because the sixty percent share level was

never reached. NFO later began direct marketing of milk, pusuant to "supply contracts" with various processors. Under these agreements, the processor would pay a flat formula price for all "NFO milk" which, in turn, would be paid to the individual producers of such milk.[7]

The foregoing practices are the principal basis of the price-fixing allegations made by both Mid-Am and AMPI. It is arguable whether NFO's efforts to promote a common marketing agency could constitute actionable price-fixing. Such an entity, if ever formed, presumably could have been structured to comply with the Capper-Volstead exemption for cooperatives. The price-fixing dimension of the NFO Master Contract program is also somewhat unclear because such contracts were never activated and their operation in practice, therefore, cannot be fully ascertained. The NFO Supply Contracts, however, involved direct milk marketing by NFO. Individual farmers signed supplemental agreements under which NFO would represent them for purposes of selling milk. Buyers of NFO milk entered into supply contracts that provided a *fixed formula price* to be paid to the NFO National Trust which, in turn, was paid on a patronage basis to the individual producers of such milk. This arrangement plainly reflects a horizontal combination of producers agreeing to have NFO fix the prices at which their product will be sold. Unless exempt from the antitrust laws, horizontal price-fixing is, of course, a *per se* violation of the Sherman Act. *See, e.g., United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927). Because the stipulated facts make out a prima facie case of price-fixing, it was error for the district court to conclude otherwise without reaching the issue of NFO's exemption. NFO is nonetheless not liable for price-fixing, however, because its milk marketing arrangements were exempt under the Capper-Volstead Act.

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[7] Because of bylaws restricting NFO's receipt and use of funds, a separate NFO Trust was created which processed dairy sales monies. *See* slip op., *infra*, at 15-16.

The Capper-Volstead Act, 7 U.S.C. § 291, was adopted in 1922 to make clear that the antitrust laws would not prohibit farmers from organizing collectively for purposes of marketing their products. The Supreme Court has construed the exemption as permitting "farmer-producers to * * * *fix prices at which their cooperative will sell their produce* * * * without thereby violating the antitrust laws." *Maryland and Virginia Milk Producers Association, supra*, 362 U.S. at 466 (emphasis added). Thus, the milk marketing arrangements of NFO are clearly within the scope of activities contemplated under the Capper-Volstead exemption.

The exemption is an affirmative defense and NFO introduced sufficient evidence to establish prima facie entitlement to the exemption. The stipulated facts show that NFO is a nonprofit, non-stock corporation which gives collective bargaining and marketing services exclusively to its members in connection with their agricultural commodities. The record further shows that in 1970, the Department of Agriculture deemed NFO to be a qualified cooperative marketing association, although the parties disputed that determination when it was made and do so here as well. The challenge to NFO's exemption relates to (1) the corporate structure of its marketing program, and (2) certain non-farmers who appear to have been members of NFO at various periods.

The structural issue arises because NFO's bylaws prohibit distribution of income to its members. As a result, when it began to market milk, NFO created a separate legal entity—essentially a trust custodial account—that received payment for milk sales and, in turn, paid the producers. The Capper-Volstead Act requires that a cooperative be "operated for the mutual benefit of the members thereof, as such producers." 7 U.S.C. § 291. Mid-Am argues that because NFO cannot distribute income, its marketing program cannot be considered to be "for the mutual benefit" of its members. This precise claim was squarely rejected in *Waters* v. *NFO, Inc.*, 328 F.Supp. 1229, 1245 (S.D. Ind. 1971). We also find no merit in Mid-Am's claim.

MidAm concedes that the NFO Trust properly operates for the mutual benefit of producer-members who market through NFO. Mid-Am insists, however, that each entity must be considered entirely independent for Capper-Volstead purposes. Such reasoning is contrary to the facts and would defeat the purpose of the Capper-Volstead exemption. NFO members who sold milk here in fact paid on a patronage basis for their products and buyers of such milk who paid the NFO National Trust knew they were dealing with NFO as essentially one organization. Under less compelling circumstances, the Supreme Court has indicated that organizational distinctions should not be permitted to defeat the clear purposes of the Capper-Volstead exemption. In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) (*Sunkist I*), the Supreme Court was presented with three legally distinct entities formed by a huge group of citrus growers. The three entities were alleged to have illegally conspired with each other, although the actual activity was lawful if engaged in by any one cooperative. The Supreme Court held they must be considered as one organization for Capper-Volstead purposes, noting:

> To hold otherwise would impose grave legal consequences upon organizational distinctions that are of de minimus meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts.

Sunkist I, supra, 370 U.S. at 29.

The *Sunkist I* rationale applies with special force where, as here, it is obvious that NFO's milk marketing, through the mechanism of the Trust Account, was fairly operated for the mutual benefit of all dairy farmers who participated.

The second and primary challenge to NFO's exemption, made by both Mid-Am and AMPI, relates to a small number of persons who appear to have been non-farmer members of NFO for certain periods in the late 1960's and early 1970's. Although this issue is more serious than the structural claim raised by Mid-Am, we again are guided by the overriding purpose of the

Capper-Volstead Act which, in our view, supports upholding the exemption claimed by NFO.

The unmistakeable purpose of the Capper-Volstead Act is to permit farmers and only farmers to band together and benefit economically from collective marketing of their products. *See, e.g., Case-Swayne Co., Inc.* v. *Sunkist Growers, Inc.*, 389 U.S. 384, 391-393 (1967)(*Sunkist II*). Here, this purpose unarguably has been served by NFO. There is no dispute that only dairy farmers—true producers—marketed milk through NFO. Only such farmers sold milk through NFO and only such farmers were paid for NFO's sale of their milk products. Moreover, NFO complied with the requirement that non-farmers be excluded from membership by adopting bylaws in 1970 which make clear that any member who quits farming "shall automatically cease to be a member, and his or her membership agreement shall become null and void."[8] Such bylaws also restrict membership to those engaged in actual production of agricultural products.

The non-farmer issue arises largely because of ignorance or sloppiness on the part of NFO in policing its membership rolls. The stipulated record includes letters from approximately twenty-five individuals which generally indicate they never were or no longer were farmers, had received membership dues billings from NFO and did not want to pay such dues. Mid-Am and AMPI assert that these letters are conclusive proof that NFO had non-farmer members and thus should be denied the Capper-Volstead exemption. On the unusual facts of this case, we disagree.

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[8] The record indicates that prior to 1970, NFO, in apparently two instances, permitted officers or staff members to retain their memberships even though the scope of their NFO duties resulted in their no longer being active farmers. One such officer's Board position was terminated in 1967, prior to Mid-Am or AMPI's formation; the other staff member apparently retained membership status until the 1970 bylaw was adopted.

The issue is a close one because of language in a 1978 Supreme Court decision which suggests that even one non-farmer member disqualifies a cooperative from claiming the Capper-Volstead exemption. *See National Broiler Marketing Assn.* v. *United States*, 436 U.S. 816, 827-829 (1978). Although it was clear prior to *National Broiler* that only farmers were within the scope of the Capper-Volstead exemption, it was not at all clear that careless membership practices would, standing alone, preclude operation of the exemption. The district court read *National Broiler* as imposing a duty to police one's membership to ensure that "not even one" non-farmer is a member. *Midwest Milk*, *supra*, 510 F.Supp. at 426. On this ground, the district court indicated that if it had reached the exemption question, it would have ruled that NFO was disqualified. The district court further indicated that, except for *National Broiler*, it would be inclined to sustain NFO's exemption because the non-farmer issue was "factually predicated upon mere record-keeping formalities—the mere presence on the membership list of names of individuals who, by express bylaw provision, had been stripped of all vestiges of membership." *Id.* at 425. The district court's discussion of the exemption is, of course, only dicta because the Court expressly did not reach the issue. It is helpful here, however, because it confirms how different the NFO situation is from the non-farmer issue in *National Broiler*.

National Broiler involved a marketing association of vertically integrated poultry producers. A number of members were only processors in that they did not own or control breeder flocks, hatcheries or grow-out facilities. *Id.* at 822. The United States challenged the exemption because these members were essentially middlemen, not farmers, and the Supreme Court agreed that Congress did not intend to exempt "even one" such middleman. *Id.* at 826-828. The Supreme Court's rationale is consistent with its earlier decision in *Sunkist II*, *supra*, 389 U.S. 384 (1967), in which it denied the Capper-Volstead exemption to a citrus growers association because approximately fifteen percent of its members were

non-farmer processors. Both cases make clear that no middlemen are to be permitted to "infiltrate" otherwise exempt cooperatives; and that vertical integration in agricultural industries cannot extend to a point where non-farmer middlemen can claim the Capper-Volstead shield. The "not even one" language in *National Broiler* cannot be divorced from that Court's emphasis on the economic role of such middlemen and on the intent of Congress not to permit such middlemen to participate in price-fixing. *National Broiler, supra*, 436 U.S. at 827-829.

There is no suggestion here that dairy industry processors were members of NFO. On the contrary, the stipulated record shows that the non-farmers who were putative members of NFO included, for example, a car dealer, a truck driver, a fertilizer salesman, a school teacher, a retired farmer, a TV salesman and a telephone company employee. The letters in the record further indicate that many of these non-farmers never considered themselves NFO members. When they received dues' billings, they typically wrote of having made "donations" to "help get things started" and of not wanting to continue doing so.

It appears that NFO may have been overly broad in its solicitation of support, but receipt of twenty-five dollars in "dues" from a handful of individuals is hardly the same as shielding middlemen from price-fixing liability, as in *Sunkist II* and *National Broiler*. Moreover, unlike the cooperatives in those two cases, NFO does not contend that the putative non-farmer members should be permitted to claim any exemption. Indeed, NFO's bylaws prohibit such persons from asserting any membership interest and there is no contention that such persons bought or sold milk through NFO.

We are not called upon to decide whether *National Broiler* requires a rigid rule for membership practices employed after that case was decided in 1978. The district court's view on such a question may well be proper. The issue here only relates to the late 1960's and early 1970's and is much narrower. Simply

put, the question is whether NFO can claim the exemption for its milk marketing activities during the period at issue here, when such activities were conducted exclusively for true dairy farmers, notwithstanding that a small number of non-farmers, unrelated to the dairy industry, apparently paid dues to NFO during that period. We think the answer is "yes" in light of the overriding purpose of the Capper-Volstead Act.

As Justice Brennan noted, concurring in *National Broiler*, *supra*, 436 U.S. at 830, the Capper-Volstead Act was "populist legislation" designed to allow farmers to band together "in order to survive against the economically dominant manufacturing, supplier, and purchasing interests with which they had to interrelate." NFO is the kind of populist farm organization contemplated by the Capper-Volstead Act. Regardless of the wisdom of its programs, NFO's entry into milk marketing exclusively on behalf of dairy farmers is precisely the kind of cooperative endeavor that Congress intended not to be subject to antitrust attack. To hold the otherwise would defeat the purpose of the Capper-Volstead Act. Moreover, it would be cruelly ironic to exempt large co-ops like Mid-Am and AMPI—professionally managed and operated by many non-farmers—while denying exemption to the farmers who banded together in NFO. We decline to do so.

Thus, we hold that the milk marketing contracts and programs promoted by NFO during the period at issue in this action do not constitute actionable price-fixing in light of the Capper-Volstead exemption.

B. Mid-Am's Boycott Claims

Mid-Am contends that NFO enlisted dairy farmers in a boycott of Mid-Am with the intent to force Mid-Am to sign an NFO milk supply contract. Mid-Am further argues that such a group boycott is a *per se* antitrust violation regardless of whether its promoter is exempt under the Capper-Volstead Act. We agree that the Capper-Volstead exemption does not shield a cooperative from liability for predatory trade prac-

tices, including group boycotts. *See* slip op., *supra*, at 9-11. Here, however, the district court rejected the crucial factual findings upon which Mid-Am's claim is based. After close analysis of the record, we cannot say the district court's findings are clearly erroneous.

Mid-Am's theory essentially is that virtually all of NFO's milk marketing activity had the sole purpose of eliminating the established cooperatives. It construes NFO's solicitation of producers as an attempt to induce such farmers to breach their agreements with Mid-Am. It argues that NFO's entry into direct marketing was not as a bona fide competitor, but rather was only intended to pressure Mid-Am into signing an NFO Supply Contract. Similarly, it characterizes NFO's sponsorship of milk withholding as coercion of the co-ops, again to pressure them into signing a supply contract. In this context, Mid-Am makes much out of a comment by an NFO official in a meeting with Mid-Am to the effect that "NFO had been a burr under the saddle of the co-ops and would just have to continue to be."

We have no doubt that NFO was such a "burr." That alone, of course, does not violate the antitrust laws. More important, Mid-Am's characterization of NFO's activities was squarely rejected by the district court. It is true that many Mid-Am members were the object of NFO's solicitations, but this was inevitable because in some regions, nearly all of the producers had been Mid-Am members. Indeed, prior to NFO's entry into marketing in Missouri, some dairy farmers had no practical alternative to Mid-Am. *Midwest Milk*, *supra*, at 469. Solicitation of business, however, is not the same as inducing a breach of contract; and Mid-Am failed to prove that NFO's activities rose to the level of the latter. Mid-Am's position would, on this record, employ the antitrust laws as a barrier to market entry—stifling the very competition which such laws are designed to encourage. We also note that Mid-Am lost and does not appeal its state law claim that NFO allegedly induced dairy farmers to breach their Mid-Am contracts.

NFO's sponsorship of a two-week milk withholding action was broad in scope and part of concerted demands for higher dairy prices. The court found that no individual farmer's decision to withhold milk was coerced by NFO or otherwise. When not directed at the elimination of competition, this type of activity, as a general matter, is within the scope of the Capper-Volstead exemption. The court found that Mid-Am failed to show that the action was intended to eliminate co-ops and we cannot say this finding was clearly erroneous.

Finally, we cannot agree with Mid-Am that NFO did not intend to be a bona fide competitor in milk marketing. We recognize that NFO's marketing program was fraught with problems, but there is no merit in Mid-Am's suggestion that it was just another "expedient" in attempting to eliminate the established co-ops. As the district court noted:

> [T]he record would come closer to supporting a set of findings that NFO became a victim of its own propaganda and that its ignorance and inexperience in the dairy field required it to experiment with one unsound idea after another.

Midwest Milk, supra, 510 F.Supp. at 420.

We affirm the district court's conclusion that Mid-Am failed to carry its burden with respect to its claim that NFO engaged in predatory practices and an illegal boycott.[9]

C. AMPI's Counterclaim

AMPI's claims were tried in Phase III of the proceedings below. Its price-fixing claim, of course, is resolved by our holding above that NFO's activity was shielded by the Capper-

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[9] The district court did not rule on damage issues, but NFO argues on appeal that Mid-Am cannot recover damages because its harm, if any, resulted from NFO's pro-competitive entry into marketing. *See Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Although there is support in the record for this theory, we need not reach the issue in light of our holding.

Volstead Act, *see* slip op., *supra*, at 18-20. The gravamen of its other charges, as characterized by AMPI, is that NFO and others conspired to gain control of sufficient milk as to control the price of milk nationwide and employed the predatory practice of inducing AMPI members to breach their agreements with AMPI. The alleged conspiracy also was aimed at "destroying" AMPI, presumably as a competitor of NFO.[10] AMPI also contends that NFO violated the Agricultural Fair Practices Act (AFPA), 7 U.S.C. § 2303.

On this record, there can be no substantive claim of attempted monopolization under Section 2. A necessary element of such a claim is a showing of a "dangerous probability" of success, which no one asserts was ever posed by NFO. Indeed, AMPI characterizes NFO's marketing programs as "grandiose" but "inept and incompetent" and the district court found them "quite unsuccessful." *Midwest Milk*, *supra*, 510 F.Supp. at 419-420. The only issue then is an alleged conspiracy under Sections 1 and 2, which AMPI asserts operated at two levels.

One alleged conspiracy was between NFO and certain nonexempt entities. Specifically, the alleged coconspirators were certain milk haulers, bottling plants and others that entered into various contracts with NFO in connection with its direct marketing efforts. The district court expressly found that these were normal business relationships and that such entities did not conspire with NFO in terms of any matters which might involve antitrust concerns. On appeal, AMPI has offered nothing which would show this conclusion to be erroneous.

The other alleged conspiracy was internal, involving various officers and employees of NFO. AMPI contends that these individuals conspired to eliminate AMPI as a competitor and

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[10] AMPI and Mid-Am contend that NFO was not a true competitor, which is probably why AMPI casts its claim simply as a conspiracy to "destroy AMPI." We treat the claim as an alleged conspiracy to eliminate competition cognizable under the Sherman Act.

employed predatory practices toward this goal. The district court did not reach the question of whether NFO is legally capable of conspiracy in this manner, and there are unsettled questions in the law of so-called intra-corporate conspiracies. *Cf. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969); *Shoenberg Farms, Inc.* v. *Denver Milk Producers, Inc.*, 231 F.Supp. 266 (D. Colo. 1964); 3 *Von Kalinowski, supra*, § 7.02[1]. We need not reach this legal issue, however, because AMPI's claims fail as a factual matter.

AMPI concedes that NFO's attempt to achieve a common marketing agency, prior to its direct marketing efforts, was pursued by seeking to have the *existing* cooperatives join together. The record further shows that until 1969, NFO supported the concept of voluntarily merging co-ops to form stronger bargaining units. Thus, these efforts hardly reflect on intent to destroy the co-ops, as AMPI argues.

AMPI's more serious contention is that NFO employed unlawful, predatory practices once it commenced direct marketing—specifically, coercing farmers to leave AMPI, join NFO, or retain their membership in NFO and unlawfully inducing AMPI members to breach their marketing contracts. The coercion claim is also alleged as a violation of the AFPA, 7 U.S.C. § 2303. The district court, however, expressly found that NFO coerced no farmers, either its members or AMPI members, and nothing in the record would make this finding erroneous. *See Midwest Milk, supra*, 510 F.Supp. at 526-527.

The inducement of breach contention is closely related to AMPI's claim that NFO used fraudulent misrepresentations to induce AMPI members to "switch" to NFO, thereby violating the AFPA. These issues have been extensively litigated in a Wisconsin state court action initiated by AMPI, upon which NFO and AMPI now make assertions of collateral estoppel and res judicata.

There is no doubt that by 1971, NFO and AMPI were in full-scale competition for milk producers. NFO solicited dairy farmers, including AMPI members, to ship through NFO's

direct marketing program. AMPI brought suit in Wisconsin state court to stop NFO's activity, commencing litigation which has twice reached the Wisconsin Supreme Court and recently an intermediate appellate court as well. The Wisconsin trial court has adopted AMPI's view and enjoined NFO three times and on all three occasions, it has been reversed and had its orders vacated.

In *Pure Milk Products Cooperative* v. *NFO*, 64 Wis.2d 241, 219 N.W.2d 564 (1974)(*Pure Milk I*)[11] the Wisconsin Supreme Court reversed a temporary injunction which had been entered against NFO. It found the injunction overly broad, indicating that legitimate competition would allow inducement of AMPI members to terminate their marketing agreements in accordance with the terms of such contracts. *Id.* at 572, 575. It also found the record inadequate with respect to any claim of fraudulent misrepresentations. *Id.* On remand, the trial court found that approximately 1,200 AMPI members had been induced by NFO to "switch" milk shipments to NFO and that such actions breached their marketing agreements with AMPI. It further found that NFO had made fraudulent misrepresentations in the course of soliciting AMPI members.

On appeal, in *Pure Milk Products Cooperative* v. *NFO*, 90 Wis.2d 781, 280 N.W.2d 691 (1979)(*Pure Milk II*), the Wisconsin Supreme Court again reversed. The court emphasized AMPI's practice of permitting its members to ship to plants of their choice without thereby breaching their AMPI contracts.[12] *Id.*, 280 N.W.2d at 696-698. On this basis, the Su-

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[11] The captioned plaintiff is a predecessor of AMPI, and the litigation was later carried forward by AMPI. We continue the *Pure Milk* designation to avoid confusion.

[12] The key apparently was that AMPI be permitted to nonetheless receive fees for testing its members' milk. Although there were disputes over NFO paying such fees to AMPI, the record shows that AMPI generally did not view such disputes as involving breach of a member's contract. *See Pure Milk Products Cooperative* v. *NFO*, 90 Wis.2d 781, 280 N.W.2d 691, 697-698 (1979) (*Pure Milk II*).

preme Court squarely held that the mere "switching" of shipments to NFO, and NFO's solicitation of such shipments, were not a breach of any contract. *Id.* at 697, 698. The Court also reversed the finding of fraudulent misrepresentations, directing that on remand such questions be considered only in the context of the approximately 160 AMPI members who had terminated their marketing agreement altogether.[13] *Id.* at 701.

On remand, the trial court reissued a broad injunction based on findings which were contrary to the Supreme Court's mandate in *Pure Milk II*. This third order was recently reversed by an intermediate appellate court in an opinion which makes clear that the issue of fraudulent representations is still open upon appellate review. *Pure Milk Products Cooperative* v. *NFO*, No. 80-1812 (Wis. Ct. App., Nov. 11, 1981)(*Pure Milk III*).

AMPI argues that because of the third decision of the Wisconsin trial court, collateral estoppel bars NFO from contesting whether it made fraudulent misrepresentations. This is plainly wrong. That trial court's findings have been reversed three times and, in the last instance, its misrepresentation findings were expressly reserved for further review. Such determinations thus lack the finality required for collateral estoppel.

NFO, on the other hand, argues that res judicata bars AMPI's assertion of both its inducement of breach and misrepresentation claims. This too misses the mark. Res judicata involves claim preclusion, not issue preclusion. Here, AMPI's claim under the Agricultural Fair Practices Act is a different cause of action from its state law claim. Thus, AMPI's assertion that NFO made "knowing misrepresentations" in violation of the AFPA is properly raised in the present action

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[13] The trial court presumably was to consider whether such terminations were fraudulently induced and was allowed to reopen fact finding on the scope and scale of such matters.

and must rest, not on collateral estoppel, but on the facts adduced below.

It appears, however, that collateral estoppel would bar AMPI's assertion that NFO's solicitation of AMPI members constituted an inducement to breach their contracts. All of the elements of the collateral estoppel doctrine are present. The parties in the Wisconsin action are identical to the parties here. The issue—whether NFO's solicitations induced a breach of contract by AMPI members—is identical to the issue here, although it is now cast as part of a predatory practice claim. The parties had a full and fair opportunity to litigate the issue, and the Wisconsin Supreme Court reached a final judgment. Its resolution of the issue was necessary to its judgment and was expressly reached. Collateral estoppel, therefore, seems applicable. *See Montana* v. *United States*, 440 U.S. 147, 153-154 (1979); *Oldham* v. *Pritchett*, 599 F.2d 274 (8th Cir. 1979). Indeed, AMPI argued vigorously in its brief that judicial economy and federalism principles weigh heavily in favor of precluding relitigation of issues settled in the Wisconsin litigation.

The district court, however, rejected AMPI's inducement of breach claims as a factual matter on the merits. Much of the evidence adduced below consisted of the evidence adduced in the Wisconsin litigation, where AMPI also lost its contention that "switching" members constituted a contract breach. After reviewing the record, we cannot find the district court's conclusion clearly erroneous.

The only remaining claim against NFO is that it made knowing misrepresentations in violation of the AFPA, 7 U.S.C. § 2303(c), (e) & (f). Whether a "knowing" violation requires intentional conduct or mere negligence is not clear under the Act and has not been addressed by any court. We find it unnecessary to reach this issue, however. The district court found both that there was insufficient evidence that false representations about AMPI were made and that, in any event, there were no "knowing" violations of the Act. *Midwest*

Milk, supra, 510 F.Supp. at 526-527. Even reviewing these conclusions under a negligence standard, we cannot say they were clearly erroneous.

For all of the foregoing reasons, we affirm the district court's judgment against Mid-Am and AMPI in their Phase I and Phase III claims against NFO.

III.

NFO'S CLAIMS AGAINST MID-AM, AMPI, CMPC AND ARSPC

NFO's claims were tried over an eighteen-month period, comprising the bulk of the record.[14] NFO alleges that Mid-Am, AMPI, CMPC and ARSPC conspired to eliminate competition, in violation of Section 1 of the Sherman Act, and monopolized, attempted to monopolize and conspired to monopolize, in violation of Section 2 of the Sherman Act. The district court ruled that NFO failed to meet its burden of proof on any of its theories under Sections 1 and 2. *Midwest Milk, supra*, 510 F.Supp. at 434-435, 502-503.

Review of this conclusion is difficult because of the paucity of the factual findings. On many of the crucial factual issues, the court's findings consist only of seriatum rejections of findings proposed by NFO—in most instances, without explanation and without adoption of alternative findings. These "negative" findings are nonetheless against NFO on such issues, and we review all of the findings under the clearly erroneous standard. Based upon such findings, we affirm the district court's dismissal of NFO's actual and attempted monopolization claims.

The district court's affirmative factual findings and record evidence in support thereof, however, unmistakably show that AMPI, CMPC and Mid-Am illegally conspired to monopolize

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[14] By contrast, Mid-Am's Phase I claim was tried over a nine-day period.

Grade A milk marketing and to eliminate competition in the marketing of such milk, and that NFO was a specific target of the conspiracy. This conspiracy violates Sections 1 and 2 of the Sherman Act, notwithstanding the Capper-Volstead exemption, because it involved the concerted use of predatory and other unlawful, anti-competitive means to eliminate competition and pursue monopoly power. We affirm the dismissal of NFO's claim against ARSPC, however, because the record does not clearly establish it was a participant in the conspiracy.

A. Actual And Attempted Monopolization

One essential element of these claims is a showing of the relevant market within which the offender achieved either monopoly power or a "dangerous probability" of such power. *See* slip op., *supra*, at 7-8. The district court ruled that NFO failed to establish relevant product or geographic markets or make a sufficient showing of market power within a properly defined market. *Midwest Milk*, *supra*, 510 F.Supp. at 502.

In our view, NFO clearly established that raw Grade A milk is a relevant product market. The court's affirmative findings are sufficient to prove this element, and it was legal error not to so conclude. Briefly, the findings show that only Grade A milk may be used for fluid products for human consumption; that Grade B milk, by definition, cannot be a substitute for or be interchanged with Grade A milk for Class I uses; that demand for Grade A fluid products is relatively inelastic; that production of Grade A milk requires stricter sanitary methods and necessitates conversion costs and higher production costs than Grade B milk; that Grade A milk is supported by minimum federally regulated prices, while Grade B prices are established in the open market; and that "premium" prices negotiated by cooperatives primarily relate to Grade A milk used for Class I purposes. *Midwest Milk*, *supra*, 510 F.Supp. at 437-443. In any commercially meaningful sense, Grade A milk is thus a relevant product market for antitrust purposes and has been deemed such in other milk monopolization cases. *See*, *e.g.*, *United States* v. *Dairyman, Inc.*, 660 F.2d 192 (6th Cir. 1981).

The relevant geographic market and market share evidence is more problematical, chiefly because it does not appear that NFO had a consistent theory of the geography underlying its actual and attempted monopolization claims. At trial and on appeal, NFO has variously asserted that the relevant geographic market is a ten-state region, or ten federal order markets therein, or a number of other submarkets, such as the regulated Chicago market (Order 30). The district court, however, found NFO's market definitions and market share data inadequate.

On this record, there is no doubt that AMPI, Mid-Am and CMPC are the major marketers of milk produced in the Midwest. CMPC's control of supply in the Chicago market, for example, is so great that at least one Chicago dairy simply could not meet its full supply needs without turning to CMPC. *See Midwest Milk, supra*, 510 F.Supp. at 482. Similarly, prior to NFO's entry into Grade A marketing in Missouri, "some of the Grade A milk producers in Southern Missouri had no practicable alternative other than to ship through Mid-Am." *Id.* at 469. Moreover, the official USDA milk pooling statistics reported in the findings overwhelmingly establish the significant market position of AMPI, CMPC and Mid-Am—singly or together pooling from seventy percent to over ninety percent of all milk pooled in various of the major federal order markets at issue here.[15] *Id.* at 448-449; *see also id.* at 488, 496.

The defendants do not deny having such significant market power. Indeed, the record reveals public assertions by Mid-Am that it controls over eighty-five percent of the Grade A milk in a number of "strategic" metropolitan markets; and similar assertions by CMPC that it represents over ninety

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[15] Notwithstanding defendants' assertions to the contrary, it is proper to look at such statistics collectively because the defendants were engaged in extensive joint marketing and territorial allocations and NFO alleges concerted, conspiratorial conduct. *See generally Von Kalinowski, supra*, ¶ 8.02[3].

percent of the producers selling into the Chicago market, and supplies over ninety percent of that market's fluid milk use. The defendants, however, dispute the sufficiency of NFO's market definition and share data, arguing that it fails to account for milk which is pooled on one order but actually sold in another, or for certain unregulated milk supplies not reflected in the "pooling" statistics or for other milk movements between orders and across boundaries variously proposed as market definitions by NFO. This raises issues of fact which the district court resolved against NFO, albeit without explanation. We thus are presented with the certainty, on this record, that AMPI, CMPC and Mid-Am are the major marketers of raw milk produced in the Midwest, but with uncertainty as to monopoly power in a properly defined market or submarkets. The burden to show monopoly power or "dangerous probability" of it, however, is on NFO. We cannot say it was clearly erroneous for the district court to find that NFO's statistical evidence was not sufficiently well defined to support its claims of actual and attempted monopolization. Accordingly, we affirm the dismissal of such claims.

B. The Conspiracy To Monopolize And Eliminate Competition

NFO alleges that AMPI, Mid-Am, CMPC and ARSPC conspired to monopolize and eliminate competition in the marketing of raw Grade A milk. Moreover, it alleges that the conspiracy involved concerted use of predatory and other unlawful tactics and that NFO was a specific target of the conspiracy. Such a conspiracy would violate Section 2 of the Sherman Act to the extent its aim is to unlawfully acquire monopoly power; it would violate Section 1 to the extent its aim is to unlawfully eliminate competition. *See Maryland and Virginia Milk Producers Association, supra*, 362 U.S. at 463 (Sections 1, 2 and 3 "closely overlap and the same kind of predatory practices may show violations of all."). A threshold question is the nature of the relevant market and intent elements of this claim.

The record evidence as to relevant market is clearly sufficient to support NFO's Section 2 conspiracy claim. It is generally held that relevant market is not a necessary element of such a claim because actual attainment or "dangerous probability" of monopoly power are not at issue. *See slip op., supra,* at 8-9. In our view, a minimal showing must nonetheless be made as to the product and geographic context of the alleged conspiracy. Here, NFO made a more than adequate showing of the ten-state region within which the defendants engaged in concerted efforts to gain control over and eliminate NFO as a competitor in the marketing of raw Grade A milk. NFO has also demonstrated that the conspiracy affects a substantial amount of interstate commerce—millions of pounds of Grade A milk shipments by NFO alone. *See, e.g. Forgett* v. *Scharf,* 181 F.2d 754, 787 (3d Cir.), *cert. denied,* 340 U.S. 825 (1950); 3 *Von Kalinowski, supra,* § 9.02[4]. Of course, an unlawful conspiracy under Section 2 necessarily violates Section 1 as an "unreasonable" restraint of trade.[16]

The more crucial issue is the element of intent. Here, the defendants do not seriously dispute, nor could they on this

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[16] The defendants concede that a Section 2 conspiracy is *a fortiori* conspiracy under Section 1, *e.g.*, CMPC Br. at 35, n.134, but attempt to circumvent this by proposing a rather convoluted application of the antitrust laws. Essentially, the assertion is that NFO tried its Section 1 claim under a rule of reason approach below and should be barred from asserting a *per se* theory on appeal; that NFO's Section 1 claim fails under the rule of reason because of an inadequate showing as to market power; and that NFO's Section 2 claim should be dismissed because otherwise a gross incongruity would result from finding a Section 2 violation which is not also a Section 1 violation. Such strained reasoning has no merit here. At trial, NFO alleged concerted predatory conduct in violation of Sections 1 and 2. Such a conspiracy, if proven, is "unreasonable" under Section 1 regardless of whether the *per se* label is attached; moreover, the record evidence as to defendants' market power is sufficient to render their alleged conduct unlawful even under the rule of reason. *See* slip op., *supra,* at 31-32.

record, that they acted in concert with the intent to eliminate competition and gain sufficient control of milk to enable them to set higher prices.[17] They properly argue that such intent is not unlawful, standing alone, because Capper-Volstead cooperatives may agree to eliminate competition between themselves and to pursue monopoly power through lawful means. The prohibited aim is to pursue such power or seek to eliminate competition through predatory, anticompetitive or other unlawful tactics. It is this unlawful intent which NFO must establish and which it has shown as to Mid-Am, AMPI and CMPC, but not as to ARSPC.

We summarize below the defendants' overt acts which NFO contends evidence the illegal conspiracy. Most of the actual conduct is not in dispute as much as is the inference of intent and conspiracy: whether the actions were in concert and were unlawfully intended to eliminate competition in general and NFO in particular; or whether they were unilateral actions taken for legitimate business reasons. The district court appears to have viewed the many incidents discussed below as isolated, self-contained actions. We recognize that when viewed in this manner, there is conflicting record evidence which could support findings that at least some of the conduct was not unlawful. When the conduct is viewed as a whole, however, there is only one conclusion that can be drawn. AMPI, Mid-Am and CMPC did conspire to monopolize and eliminate competition in the marketing of Grade A milk produced in the Midwest, through the use of discriminatory pric-

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[17] *See, e.g.*, CMPC Ex. 767, a promotional brochure stating that CMPC "was organized for the primary purpose of improving prices to all milk producers serving" Chicago, and noting in a quiz section: "Q. Is there currently a Super Pool premium on Order 30? A. No, but there could well be if all milk producers were to join the efforts of CMPC." *See also* slip op., *infra*, at 36-37, describing Mid-Am and AMPI consignment agreements, territorial allocations and other joint marketing efforts.

ing, coercive supply disruptions and threats of similar conduct, as well as bad faith harassment and threats of litigation against independent buyers of NFO milk. Although some of the district court's "negative findings" are clearly erroneous, as described below, it is in large measure the court's affirmative findings—the actual conduct viewed as a whole—which establishes the unlawful conspiracy. The findings and record evidence, however, do not clearly show that ARSPC participated in the conspiracy and we therefore affirm the dismissal of NFO's claim against this co-op.

The specific overt acts of the defendants must be viewed in light of their concerted marketing practices as a whole. AMPI and Mid-Am contend they are vigorous competitors with each other, but while they have competed at various times, the concerted nature of their marketing activities is undeniable. AMPI became a member of Mid-Am and Mid-Am became a member of AMPI. They entered into consignment agreements which effectively divided up certain marketing territories in the Midwest, South and Southwest. Mid-Am consigned some of its members' milk to AMPI for sale in the Oklahoma Metropolitan, North Texas, South Texas and Central Arkansas markets. *Midwest Milk, supra*, 510 F.Supp. at 452. Mid-Am and AMPI reached a similar consignment agreement covering the Wichita market "because there was a possibility that Mid-Am was going to begin making sales in Wichita." *Id.* These reciprocal arrangements were extended to cover the St. Louis, Nebraska—Western Iowa, Des Moines, Kansas City and Twin Cities federal market orders, the result being that Mid-Am marketed AMPI milk in some areas, and AMPI marketed Mid-Am milk in others. *Id.* To help facilitate their joint activities, Mid-Am has since 1969, assigned staff as liason with AMPI "to eliminate problems which may develop between the two organizations." *Id.* at 479.

CMPC is a federation of cooperatives which exists to sell milk into the greater Chicago market. As CMPC characterizes its own federated structure, it could function only through persons employed by or representing its constituent co-ops.

CMPC Br. at 50, n.168. AMPI is a member of CMPC and, moreover, serves as CMPC's marketing agent for Chicago. *Midwest Milk, supra*, 510 F.Supp. at 476. An AMPI official, for example, was chairman of the CMPC price development committee. With these overlapping roles of AMPI and CMPC staff, it sometimes is difficult to distinguish which entity is responsible for specific actions in the Chicago market, but the generally concerted nature of CMPC and AMPI marketing efforts is obvious.

NFO began to assemble a direct marketing program in 1969, and aggressive competition ensued between NFO and AMPI, Mid-Am and CMPC, both to garner farmers as producer-suppliers and to win supply contracts from proprietary dairies. As a new entrant, NFO sometimes offered milk at lower prices than the principal co-ops, but could initially pay its members competitive prices because its overhead apparently was not as great as that of the large, established co-ops. *Id.* at 457.

NFO's marketing efforts became a serious problem for Mid-Am, AMPI and CMPC. Mid-Am viewed NFO as a competitor in the raw milk supply business, and by 1970, "Mid-Am viewed NFO as a substantial threat to Mid-Am's maintenance of its membership." *Id.* at 457-458. AMPI, too, experienced significant membership problems from NFO and commenced extensive litigation in Wisconsin with the stated purpose of protecting marketing contracts with its members. *See* slip op., *supra*, at 25-28. Moreover, AMPI, CMPC's marketing agent, was concerned that NFO's price cutting would "undermine" the premiums being paid on the Chicago market. *Id.* at 479. The Chicago price problems were of tremendous concern to CMPC and AMPI which sold directly in that market, and were also important to Mid-Am, as one of its official's testified, because Chicago essentially functioned like a base-pricing point for other markets served by Mid-Am. *See id.;* Hanman Dep. at 180-181, 863-872.

If there could be any doubt that CMPC, AMPI and Mid-Am jointly perceived NFO as a competitive threat, such doubt is

removed by the district court's express findings that Mid-Am and AMPI officials met from time to time to discuss their concerns regarding NFO and that senior officials of CMPC, Mid-Am and AMPI—during one of the more fierce stages of the competition—assembled a joint meeting specifically to discuss NFO's "cut-rate" marketing and solicitation of their members. *Id.* at 469, 480.[18]

Against this background, we turn to evidence of the overt acts of CMPC, AMPI and Mid-Am, largely as described in the district court's affirmative findings of fact.

1. Attempt To Block NFO's Qualification.

To effectively compete in the marketing of milk, NFO had to become "qualified" by the USDA on various federal market orders. *See Midwest Milk, supra*, 510 F.Supp. at 439-441. Mid-Am, AMPI and CMPC engaged in a series of governmental contacts aimed at blocking NFO from becoming so "qualified." Contacts were made with the Wisconsin Department of Agriculture, the Missouri attorney general, regional USDA administrators and more senior USDA officials. At one point, these defendants proposed an amendment to the definition of "cooperative association" which would have seriously hampered NFO's efforts to become qualified. Some of the letters, requests and initiatives were made by Mid-Am or AMPI alone, although copies of such correspondence were typically circulated to the other co-op or co-ops. The effort clearly was a coordinated one joined in by CMPC, AMPI and Mid-Am, the purpose of which "was to foreclose NFO from the marketing of Grade A milk under Federal Orders as a qualified cooperative." *Id.* at 458; *see also id.* at 469, 480-481.

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[18] CMPC contends it was not "present" at this meeting, notwithstanding that one of the attendees, McWilliams, was chairman of CMPC's Price Development Committee and was an official of AMPI, CMPC's marketing agent.

The three co-ops contend that they objected to NFO in good faith and that, in any event, their efforts cannot constitute an antitrust violation because of the *Noerr-Pennington* doctrine. Whether the objections to NFO were in good faith is arguable. When NFO became qualified to market milk in Chicago, for example, CMPC solicited NFO to join and market through CMPC. It thus would appear that at least CMPC's concern was related as much to NFO's independence as to its atypical structure.

The *Noerr-Pennington* doctrine, however, does exempt the concerted effort to block NFO's qualification. Absent a sham, joint efforts to influence public officials, even if intended to eliminate competition, are "not illegal either standing alone or as part of a broader scheme itself violative of the Sherman Act." *United Mine Workers* v. *Pennington*, 381 U.S. 657, 670 (1965); *Feminist Women's Health Center* v. *Mohammad*, 586 F.2d 530, 542-543 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979). The sham exception generally involves governmental contacts which are not a genuine attempt to influence official decision making, but instead are merely an attempt to interfere directly with the business relationships of a competitor. *See Feminist Women's Health Center* v. *Mohammad*, *supra*, 586 F.2d at 543; Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U.Chi. L.Rev. 80, 105-111 (1977). Here, NFO's structure and some of its programs were not typical of farmer cooperatives, *see* slip op., *supra*, at 15-16, and we cannot say that the attempts to block it from being deemed a qualified cooperative were not genuine attempts to influence official policymaking. Thus, the pattern of governmental contacts are not actionable alone or as an element of the larger scheme.[19]

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[19] In so holding, we do not consider what role, if any, AMPI's political contributions might have played in its efforts to get the USDA to deny NFO's qualification. AMPI officials made a substantial series of allegedly unlawful financial contributions to the Nixon Reelection Committee at approximately the same time they

Exempt conduct may be considered, however, to the extent it tends to show the "purpose or character" of other, nonexempt activity. *United Mine Workers* v. *Pennington*, *supra*, 381 U.S. at 671 n.3; *Feminist Women's Health Center* v. *Mohammad*, *supra*, 586 F.2d at 543; *Webb* v. *Utah Tour Brokers Assn.*, 568 F.2d 670, 672 (10th Cir. 1977). Here, the district court's findings are noteworthy because they show CMPC, AMPI and Mid-Am acting in concert with the specific intent to block NFO from competing as a qualified cooperative. While not illegal because of the exemption, this conduct does have evidentiary value as to the purpose and concerted character of these co-ops' contemporaneous nonexempt activities.

2. Gandy Dairy

AMPI's handling of Gandy Dairy in the Central West Texas Market Order is one unequivocal illustration of predatory conduct aimed at coercing buyers to eliminate their purchases from independents. The district court's affirmative findings of fact and underlying record evidence may be summarized briefly. *See Midwest Milk*, *supra*, 510 F.Supp. at 474.

Prior to May of 1971, Gandy Dairy purchased all of its Grade A milk from AMPI. In March and April of that year, however, Gandy arranged to purchase part of its supply from four independents. An AMPI official met with Gandy in April to discuss such purchases and, according to one Gandy participant, expressed AMPI's "disappointment" and indicated he "didn't know what his people might do * * * There were two or three possibilities."[20] AMPI's response became clear. The very

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were seeking to influence the USDA. *See* slip op., *infra*, at 62. NFO apparently did not pursue at trial and does not argue on appeal that AMPI's financial contributions were linked to the joint efforts to block NFO's qualification. Thus, we need not decide whether such conduct would vitiate the exemption which is otherwise applicable here.

[20] Chandler Dep. at 85-86.

day that the independent shipments commenced, AMPI began short-shipping Gandy and making late deliveries of the milk which it did deliver. Simultaneously, AMPI's Gold Spot Division began soliciting Gandy's customers, offering them competing products at prices close to Gandy's cost of production. The purpose and intent of these efforts was "to get Gandy to return to AMPI for its full requirements of milk." *Id.*

Although the supply shorting and late deliveries persisted only briefly, they functioned as a warning to Gandy of the disruption it risked by making independent purchases. Similarly, the solicitations of Gandy's customers — perhaps lawful under other circumstances — were clearly part of the effort to put futher pressure on Gandy. The conduct as a whole was blatantly predatory.

AMPI's defense essentially is that its Gandy Dairy efforts were not directed specifically at NFO and that, in any event, NFO was not casually harmed because Gandy's decision not to purchase NFO milk was based upon price considerations, not AMPI's conduct. We find this unpersuasive. NFO was actively soliciting Gandy at the time of AMPI's predatory conduct. By definition, AMPI's attempts to secure a *full-supply* arrangement are directed at eliminating all non-AMPI suppliers. Moreover, the record shows that while price may have been a significant factor in Gandy's negotiations with NFO, it also shows that Gandy officials feared further AMPI retaliation if they made additional independent purchases beyond those which initially triggered the predatory conduct. On this record, to adopt AMPI's position would mean that clearly predatory conduct is excused when it is only partially successful or only one factor influencing the target company. We decline to adopt such a position.[21] AMPI's unlawful conduct toward Gandy is also significant because it tends to show an

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[21] Of course, in assessing damages, the district court may consider the extent to which NFO's harm is attributable to AMPI's conduct. *See* slip op., *infra*, at 71-73.

unlawful intent behind similar AMPI conduct which was directed even more specifically at NFO. *See Kansas City Star Co.* v. *United States*, 240 F.2d 643, 650-651 (8th Cir. 1957) (kindred acts doctrine).

3. Wanzer Dairy.

The Chicago market informally functions as a basepricing point for many markets south and west of Chicago. *See* slip op., *supra*, at 4-5, 37. The record is replete with statements by Mid-Am, AMPI and CMPC officials with respect to the importance of establishing a "superpool" or premium (over-minimum price) for Chicago milk. Accordingly, AMPI and CMPC aggressively sought to establish such a premium. Their efforts, however, included discriminatory pricing and coercive threats toward the Wanzer Dairy,[22] a substantial Chicago dairy whose purchases from NFO and others had undermined the CMPC premium.

The major trade association of proprietary milk buyers in metropolitan Chicago, AMDI, had a Producer Relations Committee which met from time to time with CMPC's Price Development Committee. AMDI dealers continually protested paying a premium for CMPC milk while another proprietary—Wanzer Dairy—was buying non-CMPC milk (including NFO milk) at lower prices. *Midwest Milk*, *supra*, 510 F.Supp. at 477-478, 482. CMPC dropped the premium in early 1970 and successfully reinstated it in January, 1971, after Wanzer entered into a committed supply contact with CMPC. It is the conduct employed in securing the Wanzer supply contract which is primarily at issue. The parties vigorously dispute

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[22] AMPI was a member of and marketing agent for CMPC. The chairman of CMPC's Price Development Committee was an AMPI regional manager. Thus, although we refer in this subsection to CMPC, some of the contacts discussed were made by AMPI officials and, clearly, both must be viewed as responsible for their joint role in the Chicago marketing.

whether such conduct also evidences that CMPC unlawfully conspired with the nonexempt AMDI group and what effect securing the Wanzer contract had on NFO. We first summarize the district court's affirmative factual findings.

Throughout the period at issue, Wanzer Dairy purchased from both independents and CMPC. It intially purchased from North Central Dairymen's Cooperative (NCDC) at prices below any CMPC premium, but by October of 1970, NCDC had joined and was marketing through CMPC. *Id.* at 478, 480. In April of 1970, when NCDC and others were independently selling into Chicago, CMPC issued a discriminatory price announcement which imposed a number of additional service charges, applicable in part to any buyer "who accounts to and settles with CMPC for less than 100% of his class I requirements (fluid Grade A products)."[23] *Id.* at 478.

Wanzer continued to make independent Class I purchases, including major purchases of such milk from NFO which commenced in July of 1970, and reached nearly ten million pounds of such milk per month during the fall peak. *Id.* at 479. In October of 1970, after NCDC had begun marketing through

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[23] The price announcement imposed a series of service charges for both full supply and partial supply buyers. For example, a handling charge was imposed for quantities of milk actually supplied by CMPC, at one rate for seven-day-a-week committed supply shipments and at a higher rate for less frequent deliveries or for supplies not subject to a *committed* seven-day-a-week arrangement. An additional "market service charge" was imposed, for full and partial supply customers, consisting of a flat fee for all Class I usage, regardless of the source of supply. In lieu of the actual handling charge plus the "market service charge," a buyer could pay a substantially higher rate just for the milk supplied by CMPC. Thus, although no buyer was forced to take a full supply from CMPC or to reach a committed supply agreement, the discriminatory pricing scheme created a substantial inducement for doing so. CMPC contends that the pricing scheme was a legitimate attempt to recoup the higher unit costs of filling supply needs of less regular buyers. *See* slip op., *infra*, at 46-47

CMPC, CMPC announced a new discriminatory price structure, elements of which again applied to any dealer "who does not report to or settle with CMPC for his total Class I requirements,"[24] notwithstanding questions raised at the CMPC Board meeting concerning the legality of the new pricing. *Id.* at 480.

A flurry of exchanges between Wanzer, Southland (Wanzer's parent corporation), CMPC and NFO followed in November and early December of 1970 — a period in which Wanzer sought to buy all of the NFO milk that it could but, as a practical matter, was forced to buy at least some milk from CMPC in order to meet its total supply needs. *Id.* at 481-482. Following the October price announcement, Wanzer notified NFO that it would cease NFO purchases and notified CMPC that it would comply with one option under the new price announcement.[25] *Id.* at 482. NFO offered to reimburse Wanzer against additional service charges and, for one month, Wanzer continued its split NFO-CMPC purchases while negotiations with CMPC continued. *Id.* at 482. By early December, Wanzer notified NFO that it would make its Class I purchases on a day-to-day basis. *Id.* at 483. On December 2, CMPC and AMDI dealers met and discussed, *inter alia*, whether Wanzer would pay CMPC's "market service charge." *Id.* at 482. AMDI dealers renewed their objection to paying more for milk than their competitors and specifically to paying any CMPC premium as long as their competitors were buying at a lower price. *Id.* at 482 On December 10, CMPC by letter notified Wanzer and Southland[26] that it was cutting off all supplies, effective in five

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[24] Essentially, the new announcement raised the "market service charge" applicable to all Class I usage and raised the much higher optional charge. *See* note 23, *supra*.

[25] Wanzer indicated it would pay the "market service charge" and not the higher "in lieu of" option. *See* note 23, *supra*.

[26] Southland, Inc., also was negotiating with AMPI to get supplies for its facilities in Texas, Oklahoma and Memphis. *Midwest Milk*, *supra*, 510 F.Supp. at 482.

days, because "we have become aware that you have been engaged with others in unlawful attempts to interfere with producers whose milk is subject to effective marketing agreements with CMPC and its members.[27] *Id.* at 483. CMPC did not terminate shipments after this threat, but instead made shipments on a day-to-day basis while negotiations continued. *Id.* Within days, Wanzer entered into a one-year committed supply contract with CMPC for major Class I purchases. *Id.*

The Wanzer-CMPC negotiations were the specific subject of various AMPI and CMPC discussions with AMDI dealers concerning reinstatement of a premium. *Id.* at 482-483. After the Wanzer-committed supply contract was reached, CMPC met with AMDI dealers, showed them the Wanzer contract and, within a few weeks, successfully reinstated an over-order premuim. *Id.* at 483.

The foregoing events and chronology are summarized from the district court's affirmative findings of fact. In our view, the conduct described in such findings is plainly predatory. Simply put, CMPC and its agent AMPI sought to establish a premium for their milk, a goal which was obstructed by AMDI dealers' objections to Wanzer's purchase of much of its Class I needs from non-CMPC sources at lower prices, including NFO milk. Facing continuing rejection of a premium under these conditions, AMPI and CMPC employed discriminatory pricing and coercive threats of supply cutoffs against Wanzer, secured a substantial committed supply agreement from Wanzer, showed this contract to the other dealers and, within weeks, successfully imposed a new premium. The attempts by CMPC

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[27] This threat relates to AMPI's contention that some NFO milk came from Wisconsin producers who were obligated to market through AMPI. AMPI commenced extensive litigation against NFO on this issue. *See* slip op., *supra*, at 25-28. Threatened litigation against buyers of NFO milk was employed elsewhere by AMPI and Mid-Am, and threatened supply cutoffs, were also employed by AMPI in other markets. *See* slip op., *infra*, at 50-57.

and AMPI to explain away each step of the campaign against Wanzer cannot obscure this overriding factual pattern.

CMPC contends that the price discrimination was simply a legitimate attempt to recover costs associated with supplying less regular customers. Such a contention might be valid in some other context, but the conduct here—viewed as a whole—clearly establishes an unlawful purpose. In addition to the conduct itself, the record reveals testimony by a CMPC official that, in adopting its pricing scheme, CMPC's major concern was with "the split supply sources at the Wanzer Dairy." An AMDI dealer, who was present in meetings with AMPI and CMPC regarding the price structure, also testified that the higher service charges were designed to affect plants buying lower-priced milk from NFO and directly from farmers and to make such plants "realize that they would be better off if they participated [in CMPC's pool] on a weekly basis or daily basis" and, moreover, confirming that the Wanzer committed supply contract was critical to restoring any CMPC premuim.[28]

CMPC also attempts to characterize its problems with Wanzer as deriving from hostility by Wanzer's local manager toward CMPC; contends its threatened supply cutoff was simply a legitimate response to AMPI's membership dispute with NFO; and implies that the committed supply contract was achieved in the ordinary course of business once Wanzer's parent company officials entered negotiations. *See* CMPC Br. At XXXIX-XLIV, 67-68. This version of events is contradicted by the testimony of the Southland official who negotiated the supply contract, which indicates that Southland

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[28] *See* Tr. at 15, 446; Wells Dep. at 58-66. The record also reveals the testimony of a Mid-Am officer that it was his understanding from AMPI officials that the Chicago pricing was designed to respond to the Wanzer-NFO problems. The latter evidence may be hearsay but it nonetheless corroborates the other evidence as to purpose; and coming from a codefendant in a conspiracy case, has more than usual guarantees of trustworthiness.

threatened legal action against CMPC to counter the impending supply cutoff and also shows that Wanzer's decision to enter into the committed supply contract was prompted largely by the pricing scheme imposed by CMPC. Moreover, the CMPC version is simply untenable in light of the record as a whole.

In looking at the evidence underlying the findings, we do not contemplate a *de novo* review. We recognize there are some conflicts in testimony; that some witnesses deny or attempt to explain away what others admit. CMPC's conduct itself, however, is the strongest evidence of an unlawful purpose and such conduct is largely established in the district court's affirmative findings. In our view, the conduct so established is predatory on its face. Our examination of the underlying evidence only confirms that an inference of unlawful purpose must be drawn. It was clear error for the district court not to find that the pricing scheme was unlawfully discriminatory and that the threatened supply cutoff was unlawfully coercive.[29]

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[29] CMPC also disputes the precise effect which the Wanzer contract had on NFO's marketing. Wanzer continued to buy a small percentage of its Class I needs through NFO, but the bulk of NFO's sales to Wanzer involved Class II allocations. CMPC contends this reflects a voluntary cutback and diversion by NFO to other Class II uses, which at the time garnered a higher price for NFO members. NFO contends that it lost Wanzer as a Class I outlet because Wanzer's committed supply contract with CMPC, while not a total supply contract, required Wanzer to allocate its CMPC purchases to Class I uses. The findings are not particularly helpful on this issue and the record is mixed. The findings do show, however, that NFO repeatedly and unsuccessfully sought alternative Class I outlets in the Chicago market, *Midwest Milk*, *supra*, 510 F.Supp. at 484, at the very time that, according to CMPC, NFO was "voluntarily" cutting back Class I sales to Wanzer. Moreover, the Southland official who reached the supply agreement testified that although Wanzer was still interested in purchasing from NFO, the committed supply arrangement with CMPC would mean a reduction in the proportion

We affirm, however, the district court's rejection of the claim that CMPC conspired with AMDI dealers to fix prices and to boycott NFO. In our view, the record simply does not support an inference that AMDI dealers' decisions not to buy from NFO were linked by any conspiratorial boycott agreement with CMPC. Such decisions may have been influenced by CMPC's conduct (which may go to damages issues), but that does not rise to the level of conspiracy. On the other hand, the record would support an inference of conspiracy to fix prices between AMDI and CMPC, but the evidence is not so strong as to make the district court's contrary conclusion clearly erroneous.

4. Litigation And Related Harassment.

Mid-Am and AMPI filed separate actions against NFO in Wisconsin and Missouri, based upon membership disputes and alleged antitrust violations, issues on which NFO largely prevailed.[30] The membership dispute involved a claim that some farmers' marketing through NFO were contractually obligated to market through Mid-Am or AMPI and that NFO had induced these farmers to breach such agreements. Based upon this claim, Mid-Am, AMPI and, in one instance, CMPC on behalf of AMPI, engaged in a pattern of litigation, threatened litigation and related harassment against independent buyers of NFO milk. The controlling legal principle is clear in this case. Resort to judicial processes is exempt from antitrust attack under the *Noerr-Pennington* doctrine, unless it may be characterized as a sham cover for what is really just

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of Wanzer's needs which would be purchased from NFO. In our view, this record sufficiently establishes the fact of injury to NFO, such that the extent of harm and precise effect of the Wanzer contract only go to the question of the amount of damages. *See* slip op., *infra*, at 71-73.

[30] AMPI's claims were asserted in Wisconsin state court and in a counterclaim in the present action; Mid-Am's claims commenced the present action. *See* slip op., *supra*, 7, 25-28.

an attempt to directly interfere with the business relations of a competitor. *See, e.g., Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623 (1977); *United States* v. *Otter Tail Power Co.*, 410 U.S. 366 (1973); *Hahn, Inc.* v. *Codding, Inc.*, 615 F.2d 830, 839-841 (9th Cir. 1980). Here, the actions directly against NFO come within the exemption, but the conduct directed toward NFO's customers clearly constitutes bad faith, unlawful harassment.

We recognize that the litigation directly against NFO was intended in part to hamper NFO's ability to compete. The burdensome cost of the litigation was one factor. Notes from internal AMPI meetings and corroborating testimony show, for example, that senior AMPI officials considered sponsorship of additional third-party litigation against NFO in the hope that the added cost of such litigation would "break NFO's back."[31] Such third-party litigation was filed and was conducted by the same attorneys who represented AMPI, although the record does not clearly establish that it was brought in bad faith. Other evidence as to the goal of the litigation is that when Mid-Am commenced its action, it intended to have its membership certified as a class so as to restrict communication by NFO with Mid-Am's members during the pendency of the litigation. Mid-Am's action was also selectively directed at NFO. Mid-Am did not bring actions against other co-ops that the court found had solicited Mid-Am members to breach their Mid-Am marketing contracts. *Midwest Milk, supra*, 510 F.Supp. at 471.

Notwithstanding the foregoing evidence of intent, we cannot say that the legal claims against NFO were so groundless as to come within the "sham litigation" exception to the *Noerr-Pennington* doctrine. There were genuine disputes regarding NFO's solicitation methods. Thus, in our view, the direct litigation against NFO is not actionable as an antitrust violation.

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[31] *See, e.g.*, NFO Ex. 1523.

Mid-Am, AMPI and CMPC, however, used the membership disputes with NFO as a pretext for threatening litigation against and otherwise harassing proprietary dairies which bought or considered buying NFO milk. At least one court has ruled that directing such conduct toward a competitor's customers is clearly outside the *Noerr-Pennington* exemption. *See Oahu Gas Serv. Inc.* v. *Pacific Resources, Inc.*, 460 F.Supp. 1359, 1386 (D. Hawaii 1978). Here, Mid-Am, AMPI and CMPC argue that their conduct was intended merely to protect their legitimate marketing rights. Any legitimate claims as to unlawful membership "raiding," however, could be fully pursued and vindicated in direct actions against NFO. The co-ops might also have sought specific performance of their marketing contracts. The findings and record evidence reveal instead a broad pattern of litigation threats and harassment against buyers of NFO milk. There may be circumstances in which actions against a competitor's customers are in good faith but, here, the pattern of conduct plainly establishes that the purpose was to put proprietary buyers into the middle of the membership dispute and to make NFO milk "too hot to handle," all in order to deter such companies from dealing with NFO.

As noted above, AMPI's claim with respect to rights over certain Wisconsin milk marketed by NFO was the pretext for CMPC's threat to cut off Wanzer Dairy's supplies. *See* note 27, *supra*. Subsequently, when AMPI wrote to NFO announcing its intention to sue NFO and demanding certain payments for such milk, copies of the threat and demand were sent to Wanzer Dairy and to its parent corporation, Southland. Similarly, after NFO began making sales to Kraml Dairy in Chicago, AMPI wrote to Kraml asserting that some of the NFO milk was subject to AMPI's marketing rights' claim and demanding that AMPI be paid directly for such milk.

The pattern is hardly limited to AMPI and CMPC. Mid-Am participated in a number of threats, including some against dairies with which AMPI was having problems. Perhaps the most blatant threat involves the Beatrice Company's facility at Fort Worth, Texas, which had been a full supply customer of

AMPI. The court's findings and underlying record evidence show that through most of 1970 and 1971, Beatrice and AMPI engaged in negotiations over maintaining AMPI purchases when AMPI's price was higher than the price paid by a number of Beatrice's competitors who were buying non-AMPI milk. *See Midwest Milk*, *supra*, 510 F.Supp. at 470. AMPI vigorously sought to retain its sales and premium price. At least one source of pressure on Beatrice apparently involved Beatrice's Tulsa facility, which faced competition from AMPI's Gold Spot division whose pricing practices prompted further complaints from Beatrice to AMPI. *Id.* at 471.

In any event, Beatrice began making purchases from or through NFO in July, 1970, and the volume of such purchases increased to several million pounds per month by February, 1971.[32] *Id.* at 471. The NFO milk sales in part involved milk from Missouri producers which Mid-Am asserted it had the right to market. In late 1970 or early 1971, Mid-Am advised Beatrice of its claim that NFO's marketing was illegal; in February, 1971, Mid-Am met with and corresponded with Beatrice to press its claim, demanding certain payments for the disputed NFO milk, threatening legal action against Beatrice and, on March 12, 1971, sued Beatrice along with NFO. *Id.* at 472-473. In late March, 1971, Beatrice notified NFO that because of payment disputes and NFO's unwillingness to indemnify Beatrice against the possible double payment situation, it was immediately terminating its NFO purchases from the Springfield facility. *Id.* at 462.

The Beatrice incident is just one illustration of Mid-Am's conduct. The Kraft Dairy in Springfield, Missouri, had been

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[32] Although the record is somewhat unclear, many of the shipments apparently involved "independent producer" milk—transactions arranged through NFO as "independent" sales when NFO was not yet qualified on a particular federal market order. It is clear, however, that Mid-Am's threats were directed at purchases of milk "by or through" NFO which allegedly were in breach of Mid-Am's marketing rights; and that Beatrice directed its termination notice to NFO, not to individual producers.

scheduled to receive NFO milk shipments at about the time that the Beatrice cutoff occurred. *Midwest Milk, supra*, 510 F.Supp. at 473. Mid-Am wrote to Kraft, indicating it had become aware of a "situation" which might involve Kraft in Mid-Am's claim over some of the milk marketed through NFO's Springfield plant, and enclosed a copy of Mid-Am's complaint which had been filed against NFO and Beatrice. The letter stated that Mid-Am had not yet investigated "the extent of involvement of Kraft," but that Mid-Am wanted to know "what agreement Kraft Foods had made with respect to the price of this milk, with whom, and when payment will be commenced." At approximately the same time that Beatrice cut off NFO, Kraft notified NFO that it would no longer buy NFO milk. *Id.*, at 473.

In May of 1971, NFO began selling milk to Marigold Dairy in Fort Worth. *Id.* at 474. On May 4, Mid-Am wrote Marigold to the effect that Mid-Am had learned of a "possible sale of Grade A milk of Missouri producers by or through the auspices of" NFO to Marigold. The letter described Mid-Am's claims regarding some of such milk and indicated that if its understanding of the possible sale was confirmed, then Mid-Am would "enforce its contractual rights including the right to receive payments for said milk." Marigold ceased buying NFO milk later that same month. *Id.* at 474.

Another illustration is found in the deposition testimony of the president of Cloverleaf Creamery, a Twin Cities' dairy that had purchased NFO milk:

> They [Mid-Am and TCMPA] told me that you buy milk from NFO and you are going to get yourself involved in some kind of a lawsuit spending all sorts of time involving yourself. And here I am. By God, they told the truth.[33]

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[33] Holcombe Dep. at 89. Holcombe apparently was deposed by NFO and was never actually sued by Mid-Am. The testimony is cited here only because it corroborates the other evidence that the pattern of threatened litigation was very broad in scope.

There is, finally, substantial evidence that Mid-Am's practice of threatening or harassing buyers of NFO milk was planned as a strategy at Mid-Am board meetings. A Mid-Am director admitted that at a board meeting shortly after filing the suit against NFO and Beatrice, Mid-Am's counsel asked the Board and staff to notify him of any NFO dealer solicitations so that he could inform such dealers that they might become involved in a lawsuit if they bought from NFO. Mid-Am's subsequent conduct shows that the board room discussion was not merely idle talk.

Mid-Am and AMPI ignore most of the foregoing incidents in their argument on appeal. On the one incident which is addressed — the Beatrice situation — Mid-Am does not attempt to justify its actions against Beatrice, but instead argues that its conduct was not the primary cause of Beatrice's termination of NFO purchases.[34] This argument misses the point. The *effect*

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[34] Both Mid-Am and AMPI contend that Beatrice's cutoff of NFO was a unilateral, uncoerced business judgment based upon price and quality considerations. Much of the support for this contention is drawn from developments after the termination, which might relate to why Beatrice did not subsequently resume NFO purchases, but which does not bear on the reasons for the March, 1971, cutoff. As to that cutoff, the termination letter itself and contemporaneous deposition testimony of the Beatrice officials involved in the decision leave no doubt that the acute factor behind the cutoff was Mid-Am's legal claim. This is fully corroborated by the testimony of the Foremost official as to what Beatrice told him immediately after the cutoff when Foremost considered buying the milk. *See* slip op., *infra*, at 58. Beatrice did not resume NFO purchases and NFO came to view Beatrice and other dairies as "coerced coconspirators;" indeed, NFO later named Beatrice as a defendant although this claim was subsequently settled. It is in this light that one must view the 1973 deposition of a Beatrice official suggesting, inconsistent with his 1971 deposition, that Beatrice's cutoff was a matter of "purely economics." Whatever price or other problems may have accompanied NFO milk, the undisputed facts are that Beatrice purchased an ever-increasing volume of such milk for a nine-month period continuing right up to the sudden cutoff, which came twelve days after Mid-Am filed suit

of threatening conduct goes to the question of damages; it does not in any manner explain or justify the conduct itself. We must look to the complaint Mid-Am initially filed against Beatrice, which alleged essentially that Beatrice was a coconspirator with NFO in an antitrust conspiracy to reduce or eliminate "responsible cooperatives" like Mid-Am. On this record, however, all Beatrice had done was arrange to buy milk through NFO. That Mid-Am voluntarily dismissed Beatrice as a defendant, after Beatrice had stopped purchasing NFO milk, speaks volumes. Mid-Am's conduct as a whole, moreover, shows that its action against Beatrice was more a springboard for threatening other dairies than it was a legitimate complaint against Beatrice.

The only justification for the conduct directed against Wanzer Dairy would be that a Wanzer official appears to have assisted NFO in its efforts to get its cheaper milk marketed into Chicago. The discriminatory price treatment and other coercive conduct toward Wanzer, however, clearly establish that the true reason for harassing Wanzer was simply to deter NFO purchases so as to secure and maintain as large a supply as possible through CMPC.

No specfic justification has been asserted for attempting to harass Kraft Dairy, Marigold Dairy or Kraml Dairy, nor has any justification been offered for Mid-Am's policy of broadly seeking out dealers which NFO was soliciting to "warn" them of possible litigation. The only defense offered is the generalized assertion of Mid-Am and AMPI that they intended only to protect their legitimate marketing rights over certain farmers' milk. There is simply no evidence in this record, however, that proprietaries were engaged in any sort of scheme to induce

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against Beatrice. In view of the timing and other contemporaneous evidence and the fact that the cutoff was made in consultation with Beatrice's legal department, there is simply no doubt that the Mid-Am litigation was a material cause of the cutoff.

farmers to breach their marketing contracts with any co-op. Those who bought or considered buying from NFO were merely interested in obtaining an independent, hopefully cheaper source of supply.

When this pattern of litigation, threats of litigation and related harassment is viewed as a whole, it becomes obvious that such conduct was an unlawful attempt to deter dairies from buying NFO milk. The district court's findings are clearly erroneous to the extent they fail to recognize these incidents and reject or fail to draw the inferences which we have found inescapable from the record as a whole.[35]

5. Foremost Dairy.

The evidence relating to NFO's attempted 1971 sale to Foremost Dairy clearly demonstrates the cumulative effect of coercive conduct by Mid-Am and AMPI.

Foremost had a facility in Springfield, which was supplied by Mid-Am, and one in Dallas, which was supplied by AMPI and at various times in part by independents. The Springfield facility is not at issue in the 1970-1971 time frame. Foremost's dealings with AMPI at its Dallas plant are another matter. The principal Foremost witness, James Rudy, testified to certain "confrontations" with AMPI over Foremost's periodic purchases of independent, non-AMPI milk—incidents involving two AMPI staff members, one Joe Murphy and J. G. Anderson. Murphy is the undisputed author of a 1969 memorandum to superiors recommending that AMPI engage in short-shipping of Foremost and another dairy in order to "resolve" the nonmember, independent purchase problem.[36]

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[35] Implicit in the findings may be determinations as to the extent to which NFO was harmed by this aspect of defendants' conduct. Such questions can be fully considered upon remand.

[36] The district court's finding that "there is no evidence that anyone acted on the recommendation proposed by Murphy" is clearly erroneous. Murphy's own testimony that no one liked his idea must

Rudy's testimony and contemporaneous memoranda indicate that Foremost experienced short-shipping by AMPI in 1969, and that Anderson of AMPI threatened similar conduct in 1970, both times—in Foremost's view—due to independent purchases by Foremost. AMPI concedes "a brief interruption" in its supply to Foremost in 1969, AMPI Br. at 42, but denies any threat in 1970. The person who is alleged to have made the 1970 threat, however, testified only that when he learned Foremost would make certain independent purchases, he told Rudy, "I was disappointed they were going to and that I hated to lose those sales," but he could "not recall" saying anything else.

This is the background against which Foremost's March, 1971, rejection of NFO milk must be viewed. NFO's offer to Foremost involved a shipment assembled for Beatrice which was cancelled by Beatrice, as noted above, about two weeks after Mid-Am's suit was filed against Beatrice. NFO offered it to Foremost, in what Rudy characterized as a rather "desperate" manner. Upon receiving the offer, Rudy contacted Beatrice to ascertain why they were cancelling the shipment, and was told about the Mid-Am litigation and certain problems with the market administrator.[37] Rudy indicated that he was told "that all they [Beatrice] had tried to do was to buy the milk and they ended up involved in litigation and they decided it was

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be viewed in light of his admission that he actively destroyed documents under the direction of one of his superiors. *See* slip op., *infra*, at 62. Moreover, the evidence establishes actual and threatened supply cutoffs or short-shipping against Gandy Dairy (by AMPI) and Wanzer Dairy (by CMPC on behalf of AMPI), in addition to the 1969 Foremost incident.

[37] The NFO milk apparently was shipped as independent-producer milk and, from time to time, questions would arise as to identification of the proper party to pay for such milk. The risk of double payment became acute when Mid-Am made payment demands and ultimately commenced its litigation.

in their best interest to discontinue purchasing the milk." Rudy then contacted NFO and turned down the milk, indicating the Springfield facility was adequately supplied by Mid-Am; and that with respect to the Dallas plant, he was not ready to "take the plunge" by buying NFO milk. Rudy stated that to "take the plunge" meant risking possible new "confrontations" with AMPI similar to the 1969 and 1970 incidents noted above; but he also indicated that the primary consideration involved the "legal implications."

The arguments of Mid-Am and AMPI on this incident confirm NFO's complaint. AMPI emphasizes that it never discussed the 1971 NFO shipment with Foremost, pointing to Rudy's testimony that his decision was "independent and objective" and that no one from AMPI told him to reject the NFO milk. AMPI also underscores the role of Mid-Am's litigation against Beatrice as a factor in Rudy's decision, notwithstanding Rudy's stated concern over possible retaliation from AMPI. AMPI Br. at 43, 44 n.45. Mid-Am, on the other hand, argues that Rudy's decision was based "solely" upon his discussion with Beatrice and not upon "anything Mid-Am said or did." Mid-Am Br. at 56. It is clear that neither AMPI nor Mid-Am directly threatened Foremost concerning the 1971 NFO shipment. It is equally clear that Foremost's "objective" decision to reject that shipment was pervaded by Mid-Am's litigation tactics against buyers of NFO milk and AMPI's prior reprisals for independent purchases. The only real dispute in the record is over which of these factors was more dominant in Foremost's decision.

Viewed in the larger context of the overall conduct engaged in by these co-ops, the Foremost incident gives rise to only one conclusion: NFO was caught in a whipsaw created by the coercive conduct of AMPI and Mid-Am toward buyers of independent milk in general, and of NFO milk in particular.

6. Other Overt Acts.

NFO alleges a number of additional incidents or actions as evidence of an unlawful conspiracy, including certain mem-

bership and hauler terminations, milk pooling practices and acquisitions and mergers. Most of this conduct would be lawful standing alone or in some other context but, here, we agree with NFO that some of the conduct was unlawfully aimed at eliminating NFO as a competitor.

One such action involves Mid-Am's response to members who terminated their relationship with Mid-Am in order to market through NFO. The district court's affirmative findings reveal a pattern of efforts designed to thwart such movements. In one incident, Mid-Am refused to honor termination notices from thirteen NFO members because they were one day late. *Midwest Milk*, *supra*, 510 F. Supp. at 495. In other instances, Mid-Am refused to reveal termination dates. *Id.* at 471, 475. Moreover, after the present litigation was commenced, Mid-Am—virtually as a policy—either refused to acknowledge or to honor termination notices from members known to be related to NFO activities, generally regardless of the producers' right to terminate. This conduct was obviously intended to hamper NFO's ability to secure producers and, in turn, to supply customers.

Both the significance and possible mootness of this conduct are reflected in the consent decree entered in the govenment's antitrust action against Mid-Am.[38] That action was consolidated before the same court which heard the immediate case. One finding from the consent decree proceedings is that Mid-Am's market power is "based upon its power to require farmers to become or *to remain* members, rather than upon ownership of assets." *United States* v. *Mid-Am, Inc.*, 1977-1 Trade Cases ¶ 61,508 at p. 71,977 (emphasis added). Under the consent decree, Mid-Am was required, for one year, to permit

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[38] We recognize that consent decree proceedings do not establish any ultimate factual or legal conclusions in lieu of a trial. We note the decree's possible mootness effect only in the sense that conduct conforming to the decree might well bear on the need for or scope of injunctive relief fashioned on remand. *See* slip op., *infra*, at 73.

any terminations upon thirty days notice; thereafter, Mid-Am could adopt one-year contracts, but for a period of five years, such contracts would be subject to certain requirements which facilitate terminations. *Id.* at p. 71,978.

Another action involves a dairy farmer, Billy Stacey, who shipped through Mid-Am and also was a contract hauler for Mid-Am in Southwest Missouri. Stacey became active in assisting NFO's efforts to establish a reload facility and, as the district court found, was fired by Mid-Am because of his activities in helping NFO. *Midwest Milk, supra,* 510 F.Supp. at 471-472.[39]

Perhaps the most egregious conduct revealed in this case relates to suppression and destruction of evidence by AMPI. In connection with this conduct, the district court granted NFO's motion for Rule 37 sanctions, but reserved ruling on the question of which sanctions to impose, apparently indicating that a monetary award may be appropriate. *See* AMPI Br. at 69. The conduct may be described simply: AMPI engaged in a deliberate pattern of shuffling and hiding documents—to warehouses, homes or other locations—specifically to avoid discovery. Some of this conduct was uncovered during the government's participation in the litigation and most of the suppressed documents appear to have ultimately surfaced. Such conduct required extensive additional proceedings to ascertain the scope of suppression and no doubt also required further review by NFO of virtually every aspect of AMPI's involvement in the case.

More serious is the stipulated fact that AMPI ordered the destruction of documents and that some were in fact destroyed. The district court characterized this conduct as involv-

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[39] Here again, the Mid-Am consent decree forbids exclusive hauling agreements, which may bear on the scope of injunctive relief fashioned here on remand. *See* 1977-1 Trade Cases ¶ 61,508 at p. 71,977.

ing "admitted bonfires." The scope of destruction remains unclear and AMPI disputes the relevancy of the destroyed documents. AMPI was involved in a series of substantial, allegedly unlawful political contributions which became the subject of the Senate Watergate investigation. Before the Senate group, at least one AMPI official who ordered destruction contended that the documents related to NFO and possible antitrust claims against AMPI, not to political matters. Other AMPI officials, on whose testimony AMPI now relies, claim the destruction related to political contributions, not antitrust matters. One of those who actually destroyed documents, Joe Murphy, contends the documents he destroyed related to his efforts to secure a merger and to certain Texas marketing activity, but not to any NFO matter. This individual is also the author of the memo proposing to short-ship Foremost Dairy and others to eliminate independent purchases, a document which managed to survive.

We can only describe AMPI's conduct as outrageous. Obviously, the relevance of and resulting prejudice from destruction of documents cannot be clearly ascertained because the documents no longer exist. Under the circumstances, AMPI can hardly assert any presumption of irrelevance as to the destroyed documents. On this record, the district court properly could have imposed the most severe sanctions upon AMPI—dismissal of its claims and default judgment against it on NFO's claim. Nonetheless, we cannot say it was an abuse of discretion not to do so. *See Fox* v. *Studebaker-Worthington, Inc.*, 516 F.2d 989 (8th Cir. 1975). It was error, however, not to draw factual inferences adverse to AMPI on matters undertaken in or through offices and individuals involved in the destruction of documents.[40] *See In Re*

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[40] We note that only AMPI was found to have engaged in willful suppression and destruction of documents. Our holdings as to a conspiracy between Mid-Am, CMPC and AMPI are based on the record as a whole and are entirely independent of this aspect of AMPI's conduct. Moreover, the adverse inferences which may be

Grace Line, Inc., 517 F.2d 404, 409 (2d Cir. 1975); *Cecil Corley Motor Co., Inc.* v. *General Motors Corp.*, 380 F.Supp. 819, 859 (M.D. Tenn. 1974).

NFO also contends that the acquisition and merger compaigns of Mid-Am and AMPI were intended to eliminate NFO, a finding which the district court rejected. There were so many mergers and acquisitions that it would be impossible to describe, even briefly, the evidence relating to each such transaction. Several overriding conclusions, however, are quite clear. Mid-Am and AMPI engaged in broad efforts to merge with formerly independent co-ops and, during a period of massive consolidation, successfully emerged as tremendously expanded entities. One purpose of these efforts, without doubt the dominant intent, was to consolidate marketing control over sufficient quantities of milk as to set and obtain higher prices for such milk. It is lawful, however, for Capper-Volstead cooperatives to specifically pursue monopoly power and, indeed, NFO itself supported the merger trend until 1969 when it undertook its own direct marketing program. Such mergers are unlawful when achieved through coercive, predatory tactics. *See* slip op., *supra*, at 9-11. Mid-Am and AMPI also acquire a number of independent proprietary dairies. Standing alone, such acquisitions may lawfully be intended to achieve production economies or similarly legitimate aims of a cooperative. Such acquisitions, however, may not lawfully be employed to foreclose competition.

Thus, the overriding issue is one of tactics and intent. Here, most of the co-op mergers were clearly voluntary. There is substantial evidence, however, that certain milk pooling practices engaged in by Mid-Am and AMPI were designed to pressure independent co-ops and individual producers to join

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drawn against AMPI relate to the type of conduct which has been described herein as unlawful and not, for example, to the pooling practices and acquisitions which have not been shown to be a part of the conspiracy.

with Mid-Am or AMPI. Although the pooling practices are quite complicated, the alleged scheme essentially involved manipulating the regulated market price system as follows: pooling additional milk supplies in a given market order so as to depress the blend price, while maintaining higher actual pay prices for the co-op's members through receipt of option payments on the out-of-order milk. In some instances, the so-called "pressure pooling" or "pool loading" was alleged simply to have been an intimidation tactic to coerce nonmembers to join; in others, it was alleged to have achieved a spread in the effective price paid to members and nonmembers. Based upon this evidence, the district court could have found that at least some of the mergers were influenced by unlawful coercion. In addition, at least one acquisition of an independent dairy involved a NFO customer which NFO lost after the acquisition. *See Midwest Milk, supra*, 510 F.Supp. at 489. On the other hand, there is substantial evidence of lawful business purposes behind formation of standby pools, related pooling practices and consolidation of marketing through mergers.

Whether the merger and acquisition campaign was an unlawful part of the conspiracy is thus an extremely close question of fact, further complicated by the sometimes hazy line between lawful and unlawful monopolization efforts when undertaken by Capper-Volstead cooperatives. After a careful review of the record, we cannot say it was clearly erroneous for the district court to reject findings that the acquisitions, mergers and related milk pooling practices were part of an unlawful conspiracy.[41] In instances where acquisitions of in-

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[41] We also note that the consent decrees applicable to Mid-Am and AMPI regulate many of the milk pooling practices complained of here, as well as any further acquisition by AMPI; and that in those proceedings, the district court determined that dissolution or divestiture of Mid-Am or AMPI holdings was not required in the public interest. *See United States* v. *AMPI*, 394 F.Supp. 29 (W.D. Mo. 1975); *United States* v. *Mid-Am*, 1977-1 Trade Cases ¶ 61,508. We affirm the district court's conclusion that, here, NFO has not established a right to relief in the form of divestiture or dissolution.

dependent dairies resulted in actual displacement of preexisting NFO sales, however, the district court, on remand, should consider whether such conduct following acquisition reflects an intent to block NFO rather than a legitimate business decision based upon price, quality or similar factors. Where post-acquisition terminations of NFO sales are found to be part of the scheme to eliminate NFO, such lost sales would form a basis for NFO's damage claim.

Our view of the milk pooling practices also prompts affirmance of the district court's finding against liability on the part of ARSPC. The principal basis for NFO's claim against ARSPC is the latter's formation and operation of standby milk pools, a practice which in principle at least is important to providing a stable supply of milk. *See* slip op., *supra*, at 4, 6. ARSPC participated in certain of the pooling practices complained of above, but because we find no liability attaches to such practices, none can attach to ARSPC's participation. NFO also contends that the existence of ARSPC's standby pools effectively reduced independent supplies making it easier for CMPC, Mid-Am and AMPI to squeeze out NFO and other independents. ARSPC's pooling, however, served legitimate business purposes and NFO failed to show that it was conspiratorically linked to the unlawful conduct of the other defendants.

The foregoing pattern of conduct establishes that Mid-Am, AMPI and CMPC conspired to gain control over milk marketing and to eliminate competition through unlawful practices. It is true that each defendant did not participate in every aspect of the conduct as a whole. CMPC, for example, exists as a federation to sell into the Chicago market and thus has no occasion to act in other markets. Mid-Am, in turn, did not sell into the Chicago market and thus had no occasion to participate in AMPI and CMPC conduct in that market. Each defendant, however, engaged in specific overt acts which on their face were in furtherance of the conspiracy. Moreover, that these acts were in concert is unmistakeable when the record is viewed as a whole. At the outset, the three co-ops engaged in

an admittedly concerted attempt to block NFO's qualification as a milk marketer. What followed in approximately the same time frame is a series of unlawful acts by each defendant aimed at eliminating independent sales of milk in general and NFO in particular, including discriminatory pricing and actual or threatened supply cutoffs, litigation and similar harassment. Some of Mid-Am's litigation threats were directed against buyers of NFO milk that had been AMPI customers, not Mid-Am customers. Mid-Am in fact gave AMPI advance notice of the suit it filed against NFO and Beatrice. AMPI and CMPC, of course, are inextricably bound together in the predatory actions undertaken in the Chicago market. The record also reveals that the defendants jointly discussed what they viewed as common "problems" posed by NFO.

Apart from the actual conduct of the defendants, the record reveals straightforward admissions of predatory motive by various AMPI officials and former officials. AMPI argues that such persons were too biased to be credible and we give AMPI the benefit of any such doubt which might support the findings of the district court. Much of the record, however, consists of deposition testimony and over 5,000 documentary exhibits. Included is a substantial paper trail of meeting minutes and contemporaneous memoranda, from Mid-Am and AMPI meetings and from independent dealers, which tend to confirm the conspiratorial and predatory character of the conduct described here as unlawful. In short, the defendants' conduct on its face demonstrates concerted, unlawful tactics and such a conclusion is confirmed, not contradicted, by examination of the underlying record.

Piece by piece, the defendants attempt to explain away the record evidence, ultimately characterizing it as "equivocal hearsay, speculation and sharply conflicting testimony." As the Supreme Court has noted, however, "plaintiffs should be give the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clear after scrutinizing of each." *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 699 (1962). Here, the

totality of the record leaves no doubt that Mid-Am, CMPC and AMPI conspired to gain cotrol over and eliminate competition in the marketing of Grade A milk, through the unlawful tactics noted above. We reverse the contrary conclusion below because we are "left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). *See also United States* v. *General Motors Corp.*, 384 U.S. 127, 141-146, n.16 (1966).

C. Standing And Damages.

In light of its ruling as to liability, the district court did not decide any question of standing to recover damages, the appropriateness of particular damage theories, or the amount of any damages. *Midwest Milk, supra* 510 F.Supp. at 503. Absent relevant findings in a case of this complexity, the matter must be remanded for a determination of damages. We address, however, a number of threshold legal challenges to recovery by NFO which have been raised by the defendants. Nearly all of them arise from NFO's structure as a nonprofit membership corporation which cannot make distributions to its members. As a result of this structure, when NFO began marketing milk, it formed a trust account which received payments from buyers, paid sales proceeds to producers and paid various marketing expenses.

The defendants contend that NFO lacks standing in the constitutional sense of having a sufficient "personal stake in the outcome;" that NFO is not the "real party in interest," as required by Rule 17(a), F.R.Civ.P.; and that NFO has not incurred any injury to its "business or property," as required under Section 4 of the Clayton Act, 15 U.S.C. § 15. *See* CMPC Br. at 2-19. In support of these contentions, the defendants rely on a line of cases holding that an association lacks standing to sue for antitrust injury inflicted solely upon its members, and additional cases in which the antitrust plaintiff was not directly harmed, was not the direct target of the antitrust conspiracy, or similarly incurred losses which were deemed too remote or indirect. *See, e.g., Illinois Brick Co.* v. *Illinois*, 431

U.S. 720 (1977); *Associated General Contractors* v. *Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979). Some of the cases relied upon by the defendants merge standing questions with issues of how to measure damages, but the essential point is that an antitrust plaintiff cannot recover for indirect injury or for derivative harm where the plaintiff is not the target of the unlawful conduct.

We agree with the defendants that NFO cannot recover its asserted "price reduction" damages. On this theory, NFO sought to recover the difference between the price that it would have obtained but for the conspiracy and the price that it actually did obtain for sales of the its milk. One threshold factual issue is causation. If NFO chose to enter a specific market at lower prices and the defendants simply lowered prices to meet such competition, there can be no recovery for such a price spread. On the other hand, if NFO can show that the defendants' unlawful conduct was a material cause in forcing NFO to lower prices, *e.g.*, if because of defendants' harassment some buyers would only consider NFO milk if it was offered at a lower price, then NFO will have established sufficient causation to pursue such damages. The measure of harm to NFO, however, because of its method of doing business, would not be the price reduction spread. NFO is a nonprofit entity which paid producers the proceeds of its sales efforts after deducting out certain marketing expenses (*e.g.*, at *x* cents per hundredweight). NFO's net revenues were thus tied to the volume of its marketing, not to the price it earned. The price reduction issue may be relevant to NFO's damages in that, by virtue of selling at lower prices, NFO may have lost members or, in turn, marketing volume. The measure of such harm, however, would be the lost fees and dues from those who stopped marketing through NFO, not the price differential. Those who directly suffered price reduction damages are individual farmers, but NFO cannot recover the measure of *their* injury—it can only recover for *its* direct injury.

The defendants attempt to bootstrap from this price reduction issue to deny NFO standing to recover any damages. The

contention essentially is that the NFO Trust Fund was a mere conduit for passing on monies from buyers to producers, and that in any event, the Trust must be considered entirely apart from NFO such that NFO, standing alone, is viewed as suffering no harm. *See, e.g., Buckley Towers Condominium, Inc.* v. *Buckwold*, 533 F.2d 934 (5th Cir. 1976), *cert. denied*, 429 U.S. 122 (1977).

In our view, NFO cannot be considered in isolation from the trust fund through which it transacted business; nor can NFO and its trust fund be deemed a mere conduit for monies to pass from buyers to producers. Buyers of NFO milk arranged purchases through NFO, not through individual farmers. When some of such buyers terminated purchases in the face of defendants' harassment, they sent notice of such action to NFO, not to individual farmers. Buyers thus dealt with NFO as a single entity and viewed the trust arrangement, if at all, as a bookkeeping matter. The trust fund was not a mechanical pass-through device either. NFO reblended the proceeds of its marketing efforts through the trust, to determine the actual pay price to individual producers. It also deducted certain marketing expenses from such proceeds. These determinations were made in NFO's discretion, based in part on the perceived need to maintain competitive pay prices to producers.

Moreover, NFO's marketing program was in direct competition with the defendant co-ops and NFO, as a competitor, was a direct target of the unlawful conspiracy. NFO thus was not an indirect or derivative victim of actions aimed at individual farmers. As NFO's market penetration grew, it earned net revenues in the form of membership dues and checkoff fees from those who marketed milk through NFO. Losses of such dues and fees, to the extent attributable to the defendants' unlawful conduct, represent direct injury to NFO in its "business or property."[42] It is axiomatic that a competitor directly

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[42] The cooperative industry is unique, as defendants have stressed in other contexts, in that the ability to retain members to market

injured from such a conspiracy is a real party in interest and has a sufficient personal stake in the outcome to have standing to assert an antitrust claim. *See Zenith Radio Corp* v. *Hazeltine Research*, 395 U.S. 100, 123-125 (1969); *cf. Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339-340 (1980)(holding that injury to "business or property" is not limited to commercial intrests; consumer's pecuniary loss was sufficient); *see also* 15 *Von Kalinowski*, *supra*, § 115.01-.03.

The defendants also attack NFO's right to recover membership dues and checkoff fees on the ground such damages are speculative, present impossible tracing problems, and ultimately reflect self-inflicted harm rather than damage causally linked to defendants' unlawful conduct. These arguments largely raise factual questions for the district court, but the fundamental legal guidelines are clear.

A plaintiff must, as a threshold matter, establish "the fact of injury." As the Supreme Court has construed it, a plaintiff's "burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Zenith Radio Corp.* v. *Hazeltine Research*, *supra*, 395 U.S. at 114, n.9 (emphasis in original). Causal links also may properly be a matter of inference from the circumstances and evidence as a whole. *Id.* at 123-125. Here, there is no doubt that the unlawful conspiracy was the material cause, for example, of Beatrice's cutoff decision in March of 1971 and of Foremost's subsequent rejection of the same shipments. *See* slip op., *supra*, at 53-54, 55-56, 57-59. The extent to which rejections of NFO milk by these dairies in other periods (or by other dairies in the face of

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through the cooperative is a key element of the organization's ability to compete. Indeed, loss of membership dues is one damage element asserted by the defendants in their claims against NFO. Under these circumstances, lost membership dues are not indirect injuries and NFO is entitled to recover such dues to the extent such losses are reasonably shown to be caused by the antitrust conspiracy.

similar conduct) were also due to defendants' conspiracy is a factual question for the district court. Because the fact of injury is unmistakable on this record, the district court has rather broad latitude in assessing the amount of damages which NFO shall recover. *See Zenith Radio Corp.* v. *Hazeltine Research, supra,* 395 U.S. at 123; *Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251, 264 (1946).

Some of these damages are conceptually clear, such as checkoff fees from lost sales where NFO was marketing milk as a qualified marketer and received or would have received monies through its trust fund. The amount recoverable is factually more complicated where NFO sales were terminated before NFO was formally qualified in a market and had arranged payments directly between buyers and producers. Elimination of these activities was well within the scope of the unlawful conspiracy, however, and NFO has a right to recover the fees and dues that it reasonably shows it would have derived in such markets but for the effect of the unlawful conduct.

We also recognize the NFO's entry into the business of milk marketing was not conceived or managed as effectively as the efforts of the co-ops and that NFO cannot recover for losses clearly attributable to its own failures. On the other hand, NFO correctly argues that "defendants are really trying to clip NFO's wings and then escape liability on the grounds that NFO 'cannot fly.' " NFO Rep. Br. at 58. We note only that the district court must weigh these factors, mindful that the legal standard permits recovery were defendant's unlawful conduct is "a material cause of injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury." *Zenith Radio Corp.* v. *Hazeltine Research, supra,* 395 U.S. at 114, n.9.

The only other question[43] relates to injunctive relief and the possible mootness effect of the Mid-Am and AMPI consent decrees. NFO is plainly entitled to an injunction against the kind of unlawful conduct identified here. The district court is, of course, free to consider the extent to which the consent decrees provide NFO with sufficient, enforceable relief.

The district court may, in its discretion, conduct such further proceedings and make such new findings as may be appropriate to ensure that the detemination of damages and other relief can be made consistent with this opinion.

Affirmed in part, reversed in part and remanded.

NFO's costs on appeal shall be borne in equal shares by CMPC, Mid-Am and AMPI. The latter and ARSPC shall bear their own such costs.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[43] The defendants do not dispute that NFO is entitled to recover the costs and reasonable legal fees related to prosecuting its affirmative antitrust claims.

NFO I

(510 F.Supp. 381)

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JPML Docket No. 83

In re:

MIDWEST MILK MONOPOLIZATION LITIGATION:

Civil No. 19191-1

ROBERT B. ALEXANDER, *et al.*,
Plaintiffs,

vs.

THE NATIONAL FARMERS ORGANIZATION, INC., *et al.*,
Defendants,

vs.

ASSOCIATED MILK PRODUCERS, INC., *et al.*,
Counterclaim Defendants.

MEMORANDUM OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF *PHASE I, PHASE II AND PHASE III AND ORDERS TO CLERK*

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INTRODUCTION

For the convenience of the Court and counsel for the parties, the trial of this complex litigation was divided into three parts consistently referred to as Phase I, Phase II and Phase III. For further convenience the various parties were and are referred to as follows:

> National Farmers' Organization, Inc., as "NFO." Mid-America Dairymen, Inc., as "Mid-Am." Associated Milk Producers, Inc., as "AMPI." Central Milk Producers Co-operative as "CMPC." Associated Reserve Standby Pool Cooperative as "ARSPC."

Phase I of this case involves Mid-Am's claim as plaintiff against NFO as defendant for alleged violations of Section 1 of the Sherman Act, Section 2(c) of the Robinson-Patman Act, and Section 274.260 R.S. Mo. 1969. Mid-Am claimed actual damages in the amount of $1,989,350.00, to be trebled, and its attorneys' fees and costs. In accordance with the findings of fact and conclusions of law separately made and stated in connection with Mid-Am's Phase I claim against NFO, an order will be entered directing that judgment be entered against Mid-Am on its Phase I claim and in favor of NFO.

Phase II of this case involves NFO's counterclaim against Mid-Am, CMPC, ARSPC, for alleged violations of Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act. NFO sought equitable relief and damages in the amount of $14,064,068.76, to be trebled, and its attorneys' fees and costs. In accordance with the findings of fact and conclusions of law separately made and stated in connection with NFO's Phase II counterclaim against Mid-Am, CMPC, and ARSPC, an order will be entered directing that judgment be entered against NFO on its Phase II counterclaim and in favor of Mid-Am, CMPC, and ARSPC.

Phase III of this case involves AMPI's claims against NFO and nineteen individual NFO members and/or employees for alleged violations of Sections 1 and 2 of the Sherman Act and certain provisions of the Agricultural Fair Practices Act of

1967. AMPI sought equitable relief and claimed damages in the amount of $9,145,003.83, to be trebled, and its attorneys' fees and costs. In accordance with the findings of fact and conclusions of law separately made and stated in connection with AMPI's Phase III claim against NFO, an order will be entered directing that judgment be entered against AMPI on its Phase III claim and in favor of NFO.

PHASE I FINDINGS OF FACTS

A.

Court Exhibit I is a stipulation of 3,206 agreed facts with respect to Mid-Am's claim against NFO. While Mid-Am filed a 289 page document entitled "Plaintiff's Post-Trial Proposed Findings of Fact," which contained 2,224 separate paragraphs of proposed findings of fact, Mid-Am simultaneously filed its "Proposed Findings of Ultimate Facts and Proposed Conclusions of Law," 52 pages in length and containing 239 separate paragraphs of proposed *ultimate* factual findings. That filing fully sets forth Mid-Am's basic factual and legal theories in support of Mid-Am's liability claims against NFO. NFO's filing entitled "Defendant's Post-Trial Proposed Findings of Fact and Conclusions of Law," 35 pages in length, contains 206 separate proposed factual findings to support NFO's various defenses to Mid-Am's claims.

Both Mid-Am's proposed findings of ultimate facts and NFO's post-trial proposed findings of fact rely in large part on particular paragraphs of Court Exhibit I, the stipulation of agreed facts. Indeed, Mid-Am, for the most part, actually quotes particular paragraphs of the stipulation as a particular paragraph of a proposed finding of ultimate fact. NFO, on the other hand, elected to cite and paraphrase rather than quote many of the stipulated paragraphs. While Mid-Am consistently and quite routinely denied the accuracy of NFO's paraphrase of the various paragraphs of the stipulation, Mid-Am did, as it must, agree that the various paragraphs cited by NFO in support of its proposed findings of fact were true and accurate factual statements.

Careful study of the findings proposed by both parties established that each party in a great many instances either quoted or cited exactly the same paragraph of the stipulation of agreed facts to support one of their respective proposed findings of fact. Each party, of course, either quoted or cited other particular paragraphs of the stipulation in support of other proposed findings which were not quoted or cited by the other party.

It is apparent that all questions concerning the accuracy of NFO's paraphrase of a particular paragraph of the stipulation will be eliminated if the Court makes its finding of fact in the exact language of the paragraph of the stipulation which NFO cited in support of a particular finding proposed by NFO. It is also apparent that all questions concerning the accuracy of Mid-Am's paraphrase of particular paragraphs of the stipulation in various of its proposed findings of ultimate fact which are denied by NFO will be eliminated if we make findings in the exact language of the stipulation which are cited and relied upon by Mid-Am in support of any particular denied proposed finding.

By following the above procedure it will be apparent that both parties will have available for likely appellate review all agreed factual data from the stipulation which both sides will have either quoted or cited to support proposed findings based on particular paragraphs of the stipulation. Because NFO commendably admitted all except a relatively small number of Mid-Am's proposed findings of ultimate facts, we shall make all findings proposed by Mid-Am in its filing which have been admitted by NFO and insert additional paragraphs from the stipulation which NFO either quoted or cited in support of findings proposed by NFO. We shall also insert additional paragraphs from the stipulation which Mid-Am cited and relied upon to support particular findings of ultimate fact which it proposed but which were denied by NFO.

For purposes of clarity, the paragraphs of the stipulation which we will insert will carry an appropriate paragraph number which will show that it is an inserted paragraph of the

stipulation which either Mid-Am or NFO either quoted or cited in support of one of its proposed findings of fact. We will not, of course, repeat or renumber the numerous paragraphs of the stipulation which both sides either quoted or relied upon to support a particular paragraph of their respective proposed findings.

The facts that will be found in part I of this opinion will therefore reflect facts which both sides will have agreed in their stipulation to be true and accurate factual statements. As will be apparent from later portions of this memorandum opinion, the real disputes in regard to Phase I of this litigation, for the most part, present legal questions and relate, on the facts, to questions of what inferences should be drawn from stipulated and undisputed underlying factual circumstances.

B.

We find the following facts:

ULTIMATE FACTS ON ISSUES OF ILLEGAL BOYCOTT[1]

1. This action involves claims by the plaintiff that the defendant violated Section 1 of the Sherman Act, 15 U.S.C. § 1. In addition thereto plaintiff asserts that the defendant violated Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c) and Section 274.260, R.S. Mo. 1969.

2. The activities complained of include alleged attempts by the defendant to force the plaintiff, its predecessors, and other dairy cooperatives to sign Master Contracts pursuant to which

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[1] Mid-Am's proposed findings of ultimate facts are grouped under six separate headings. Paragraphs 1 to 159 are grouped under the heading "Ultimate Facts on Issues of Illegal Boycott;" paragraphs 160 to 195 are grouped under the heading "Ultimate Facts Regarding NFO Membership Agreement as a Tying Arrangement;" paragraph 196 to 216 are grouped under the heading "Ultimate Facts Regarding NFO's Unfair Trade Practices;" paragraphs 217 to 222 are grouped under the heading "Robinson-Patman Findings;" paragraphs 223 to 232 are under the heading "Ultimate Facts of NFO Violation of

NFO members would allegedly be guaranteed a specific price for their milk; a milk holding action in 1967 which was sponsored by the defendant for the alleged purpose of inducing dairy cooperatives to sign Master Contracts; withdrawals of milk from plaintiff and its predecessors by dairy farmers at the defendant's encouragement, for the alleged purpose of inducing the plaintiff to sign a Milk Supply Contract allegedly guaranteeing defendant's members a greater return for their milk than other dairy cooperative members.

3. Plaintiff, Mid-Am and its predecessors have been engaged in marketing the milk of their dairy farmer members in interstate commerce since at least the early 1960's. (Stip. 104)

4. NFO is a national membership organization with state, county and district units established at various locations throughout the United States. (Stip. 10)

5. In the milk industry milk is usually sold from the farm to either an independent bottler or manufacturer, or to a bottling or manufacturing facility operated by a cooperative association. (Stip. 138)

6. Dairy cooperatives handling fluid milk (Grade A—approved milk) dispose of their member's milk either by sales to handlers or cooperative's fluid milk processors or to the cooperative's own manufacturing facilities or the manufacturing facilities of other independent or cooperative organizations. (Stip. 140)

7. As a result of NFO's activities it was able to obtain Master Contracts and Milk Supply Contracts from many

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Missouri Law;" and paragraphs 233 to 239 are under the heading "Ultimate Factual Findings In Support of the Plaintiff's Damages."

Counsel for both sides have followed the grouping pattern established by Mid-Am. We shall follow the same pattern and follow the same numbering of paragraphs as that followed by counsel for the convenience of counsel and any appellate review that may follow this Court's determination of the case.

cooperatives and proprietary plants located throughout the Middle West. (Stip. 193, 479-561)

8. The 1967 Milk Holding Action was sponsored by the defendant NFO and resulted in milk being withheld and dumped on the ground in Missouri, Iowa, Nebraska, Minnesota and elsewhere. (Stip. 348, 356, 372, 375, 379, 388, 389, 395, 396)

9. [Mid-Am's proposed finding of ultimate fact No. 9 was expressly denied by NFO. It stated:

> 9. NFO's activities in 1969, 1970, and 1971 to induce members of Mid-Am to withdraw their milk from Mid-Am in an effort to force Mid-Am into signing a Milk Supply Contract involved both a withdrawal of milk from Mid-Am and the shipment of that milk from Missouri farms to buyers in Oklahoma and Texas. (Stip. 95, 96, 98, 99, 663, 700, 702)

In order to remove any doubt about the accuracy of Mid-Am's paraphrase of the cited paragraphs of the stipulation, we reject the finding proposed in paragraph 9 and, in lieu thereof, make additional findings and insert additional paragraphs in our findings of fact in the exact language of the paragraphs of the stipulation which have been cited and relied upon by Mid-Am to support its denied proposed finding of ultimate fact.

The same insertion of additional paragraphs from the stipulation will be followed in connection with other denied and rejected paragraphs of Mid-Am's proposed findings of ultimate fact which are based on paragraphs of the stipulation.

Additional paragraph "9-95" will indicate that in lieu of making Mid-Am's denied proposed finding No. 9, the Court is making and inserting additional findings in the language of the paragraphs of the stipulation which Mid-Am has cited to support its proposed finding. "9" identifies the number of Mid-Am's denied proposed finding; "95" identifies the paragraph 95 of the stipulation.

We shall follow this same numerical practice in connection with all other Mid-Am denied and rejected proposed findings of ultimate fact which are based on particular paragraphs of the stipulation.]

9-95. Beginning in February, 1970, NFO shipped milk produced in Missouri to Midwest Creamery, Ponca City, Oklahoma. (Ct. Exh. #1, ¶ 95)

9-96. At various times since February, 1970, NFO shipped milk produced in Wisconsin to Midwest Creamery, Ponca City, Oklahoma, and milk produced in Missouri to Boswell Dairy, Fort Worth, Texas. (Ct. Exh. #1, ¶ 96)

9-98. In May, 1971, NFO shipped Missouri-produced milk to Midwest Creamery, Ponca City, Oklahoma. (Ct. Exh. #1, ¶ 98)

9-99. NFO has from time to time shipped milk produced in Missouri to Packett Dairy, O'Fallon, Illinois.

9-663. On July 19, 1969, NFO entered into a Milk Supply Contract with Midwest Creamery of Ponca City, Oklahoma. (I Avila Exhibit 2) (Boxley Ex. 6)

9-700. The Mountain Grove Reload facility was established in late January or early February, 1970, and began to ship milk to Mid-West Creamery, Ponca City, Oklahoma. (Ct. Exh. #1, ¶ 700)

9-702. Beginning in late February, 1970, milk was shipped directly from the NFO Jefferson City Reload facility to Mid-West Creamery, Ponca City, Oklahoma.

10. Mid-America Dairymen, Inc., is a cooperative marketing association incorporated July 1, 1968 under Chapter 17-1601 of the Cooperative Marketing Act of the State of Kansas, engaged in collectively marketing fluid grade (Grade A) milk on behalf of its members and manufacturing into finished dairy products the surplus fluid grade milk and non-fluid grade milk of its members. (Stip. 1, 4, Tr. 909-927)

11. NFO is a not-for-profit non-stock membership corporation organized in 1955 under Chapter 504 of the Iowa Code. (Stip. 9)

12. NFO's national organization has its principal office in Corning, Iowa and in accordance with NFO's by-laws numerous state, district and county units have been chartered. (Stip. 9, 10, P. Ex. 9)

13. Although originally organized as a protest organization to oppose the federal government's agricultural policy as it existed in 1955, NFO in 1957 amended its Articles of Incorporation to add as an object and purpose of the corporation bargaining collectively on non-pecuniary basis for prices, terms and conditions of sale and delivery and payment for its members agricultural products. (Tr. 124-125; Stip. 18)

14. NFO's By-Laws adopted in 1970 recite that a purpose and objective of NFO is "to unite into one organization . . . all farmers engaged in the production of agricultural commodities." (Stip. 158)

14A. By the terms of its By-Laws, NFO is expressly forbidden "to enter into, or engage in any business in behalf of or in the name of the organization, of the sort commonly engaged in by corporations for profit." By-Laws, Art. II, S 5. (Ct. Exh. #1, ¶ 37)[2]

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[2] Paragraph 14 A and paragraphs 14 B through 14 E to immediately follow illustrate how we have and will insert paragraphs in our findings of fact from the stipulation of agreed facts (Court Exhibit 1) which NFO either quoted or cited in support of particular paragraphs of its proposed findings of fact. Our finding in paragraph 14 A, for example, is an exact copy of paragraph 37 in Court Exhibit 1, cited by NFO to support its proposed finding of fact 22. Paragraph 14 B, cited to support NFO's finding 14, is paragraph 38 of the stipulation. Paragraph 14 C, 14 D, 14 E, cited to support NFO's findings 23, 23, and 15, respectively, are paragraphs 43, 44, and 46, respectively, of the stipulation. All the paragraph numbers to which a capital letter has been added in our remaining findings of fact have a similar source and meaning.

14B. The organization, until dissolved, is prohibited from making dividends or distributions in property to its members or officers. Articles, Art. III. (Ct. Exh. #1, ¶ 38)

14C. The marketing assistance activities are not engaged in for the production of income. (Ct. Exh. #1, ¶ 43)

14D. NFO's By-Laws prohibit it from engaging "in any business in behalf of or in the name of the organization, of the sort commonly engaged in by corporations for profit." (Ct. Exh. #1, ¶ 44)

14E. NFO has no net earnings and it makes no distributions of any kind from net earnings to its members. (Ct. Exh. #1, ¶ 46)

15. NFO has engaged in some limited marketing services and assistance in its milk bargaining program while confining its activities in other commodities to strictly bargaining for the price and terms of sale. (Stip. 54, 47, 70, 30)

16. At the time NFO developed its collective bargaining approach, a membership agreement was adopted and since 1957 or 1958, those persons desiring to become a member of NFO have signed the membership agreement. (Stip. 26, 146, 148)

17. In pursuing its collectively bargaining for its members NFO requires the participants to sign what are called supplemental agreements which documents are an indication of participation and gives NFO information concerning the amount of agricultural production which its member is authorizing NFO to bargain for. (P. Ex. 108)

18. Basic to the NFO bargaining concept are contracts with buyers which ultimately NFO hopes will reflect the farmer's cost of production plus a reasonable profit. (Stip. 27, 163, 164, 171, 204)

19. One of the purposes of NFO is to affect the price for which agricultural commodities are sold to processors, in all agricultural commodities. (Stip. 170)

20. In order to obtain contracts containing prices and terms which NFO desires, the NFO bargaining strategy includes the holding of products off the market ("holding actions") and picketing. Like a strike in the labor field, a holding action allows NFO and its members to proceed from a position of strength to bargain with buyers of farm commodities to establish favorable prices and other terms and conditions of sale. (Stip. 19, 20, 21, 25)

21. [Mid-Am's proposed finding of ultimate fact No. 21 was expressly denied by NFO. It stated:

> 21. In pursuing collective bargaining in milk, NFO commenced by soliciting dairy farmers to join NFO and sign an NFO membership agreement. (Stip. 188, 189)

In accordance with the procedure and practice described under paragraph 9, above, we make findings as agreed to in the stipulation in lieu of Mid-Am's proposed finding of ultimate fact No. 21. New paragraphs 21-188 and 21-189 need not, however, be inserted because our findings 32 and 33, *infra*, are in the precise language of paragraph 188 and 189 of the stipulation.]

22. In the early 1960's NFO developed what were known as "master contracts;" one contract to be entered into with buyers and processors of fluid grade (Grade A) milk and another contract to be entered into with milk plants receiving raw milk for conversion into manufactured products such as butter, milk powder and cheese. (Stip. 27, P. Ex. 93a and 93b, Tr. 68-71)

23. NFO chose to negotiate master contracts in milk with what NFO considered to be the first buyer of raw milk. (Stip. 208, 200, 201, 259)

24. The first buyer might be a privately owned bottling plant or manufacturing plant, or a dairy cooperative comprised of dairy farmer members who owned the assets and shared earnings on a patronage basis. (Stip. 137, 138, 139, 140, 256, 259)

24A. Milk is usually sold from the farm (whether sold as an independent producer or marketing association member) to either an independent bottler or manufacturer, or to a bottling or manufacturing facility operated by a cooperative association. (Ct. Exh. #1, ¶ 137)

24B. Immediately after it is collected from the farms, the raw (unpasteurized) milk is normally transported by the hauler to reloads, distributing plants, bottling plants or manufacturing plants for processing and packaging, manufacture or reshipment. (Ct. Exh. #1, ¶ 138)

24C. Independent fluid buyers ("handlers") customarily purchase their milk either from a milk cooperative or marketing association or from independent dairy farmers, and on occasion from another independent fluid milk business. (Ct. Exh. #1, ¶ 139)

24D. Fluid milk cooperatives dispose of their members' milk either by sales to handlers or cooperative fluid milk processors or to the cooperative's own manufacturing facilities or the manufacturing facilities of other independent or cooperative organizations. (Ct. Exh. #1, ¶ 140)

25. NFO's ultimate goal and purpose is to bargain collectively for all farmers and all agricultural commodities. (Stip. 158)

26. In order to induce the dairy cooperatives, including plaintiff's predecessors, to execute master contracts guaranteeing NFO dairy farmer members a higher price for their milk irrespective of the profitability of the cooperative, NFO threatened the cooperatives with the withdrawal of NFO members and their milk if the contract wasn't signed. (Tr. 180, 237-348, 361)

27. Specific threats were made to Mid-Am predecessors, North Star-Lakes Region in Fergus Falls, Minnesota; Square Deal Milk Producers in Highland, Illinois; Producers Creamery Company of Springfield, Missouri; Nemaha Cooperative Creamery, Sabetha, Kansas, followed by a withdrawal of pro-

ducers and their milk when the cooperatives refused to sign a master contract. (Tr. 347-348, 585)

28. During the mid 1960's, NFO sought to have dairy cooperatives that had signed master contracts join together in a common marketing agency known as Nation Wide Milk Products to jointly market milk and dairy products. (Stip. 150, 154, 190, 200, 284, 285, 286, 287, 290, 295)

29. In order to begin forming the marketing agency in common in milk, in the early 1960's NFO approached the larger milk cooperatives, including those in the Chicago, Twin Cities, Des Moines, Omaha, and Kansas City areas. (Stip. 184)

29A. In the early 1960's, the marketing agency in common concept suggested by NFO was that the co-ops would establish one organization so that the milk of the organization's member co-ops could be marketed through one organization to gain bargaining strength. (Ct. Exh. #1, ¶ 179)

29B. In the early 1960's, the common marketing agency envisioned by NFO would itself determine what the price of its milk would be and when that milk would be sold. (Ct. Exh. #1, ¶ 181)

30. In proposing a marketing agency in common to the larger cooperatives in 1959, or 1960, possibly 1961, there were two or three meetings between NFO personnel and dairy cooperative personnel. (Stip. 185)

31. In 1959 or 1960 none of the large cooperatives undertook to form or join a marketing agency in common. (Stip. 187)

32. As a result of statements made by the dairy leaders at their meeting in Minneapolis between NFO and the large dairy cooperatives in 1959 or 1960, Staley became convinced that NFO was going to have to organize in the milk field because he did not agree with the cooperatives and their leaders' philosophy of pricing milk to buyers. (Stip. 188)

33. In the early 1960's, NFO meant by "organizing in the dairy field," getting membership agreements signed. (Stip. 189)

34. NFO met continued resistance from the dairy cooperatives to signing contracts guaranteeing some dairy farmers a specific price for their milk delivered to the cooperative. (Stip. 296, 186, 187)

35. In late 1962, NFO was attempting to negotiate a Master Contract for milk with TCMPA. (Stip. 222)

36. TCMPA declined to sign the Master Contract of NFO. (Tr. 168)

37. TCMPA began to receive pressure from its own patrons seeking to force TCMPA to sign the Master Contract of NFO. (Tr. 168)

38. During 1963 and 1964 Twin Cities had approximately 300 termination notices which stated that the reason the producer was terminating was that Twin Cities had not signed an NFO Master Contract. (Tr. 178)

39. In 1963 many members of the TCMPA Board of Directors were present at a meeting at the YMCA in Minneapolis with Albin Rust, Dairy Dircetor of NFO, Erhard Pfingsten, Vice President of NFO, Leroy Swaber of NFO and TCMPA patron, and Leroy Lindenfelder, another TCMPA patron.

Rust stated at the meeting:

> You so-and-so's (TCMPA) better sign an NFO contract or we're going to break TCMPA; you have given us the runaround long enough, we've had enough excuses from TCMPA, and if TCMPA does not sign an NFO Master Contract TCMPA is going to lose a lot of producers, because we have plenty of plants that we are signing.

TCMPA's producers will be diverted to those plants and TCMPA will end up without any milk." (Tr. 180)[3]

40. The March, 1963 meeting of the TCMPA representatives at the YMCA was not an official Board meeting; a Board meeting was later held where the Rust presentation was reviewed and the decision was made that in view of what Rust had stated at the meeting, TCMPA was not going to attempt to proceed to negotiate further with NFO. (Tr. 180, 181)

41. In February, 1964 there was a meeting of the Square Deal Cooperative Board of Directors with NFO personnel,

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[3] NFO denied Mid-AM's proposed findings of ultimate facts as stated in this paragraph 39 and Mid-AM's proposed findings stated in the two immediately following paragraphs 40 and 41. NFO based its denial on the alleged ground that the "evidence does not establish NFO positions or authority of individuals named." We find and conclude that the ground upon which NFO based its objection is not tenable. We therefore make all three findings in the language proposed by Mid-Am.

It should also be noted that NFO further objected to all three of the findings proposed in Mid-AM's paragraphs 39, 40 and 41 on the additional ground that those findings are "irrelevant." Study of the pages of NFO's post-trial brief and NFO's separate answer brief shows that the thrust of NFO's argument in that regard is primarily directed against the weight to be given Mid-Am's proposed findings. NFO's objection that what may have occurred at the meetings in 1963 and 1964 is "irrelevant" is also based on the legal premise that the factual data contained in the three findings proposed by Mid-Am are of no legal consequence to the determination of this action within the definition of "relevant evidence," as stated in Rule 401 of the Rules of Evidence.

While we quite agree with NFO's contention that evidence of NFO's 1963 insistence that it would not sell NFO milk to TCMPA unless that co-op executed an NFO Master Contract, standing alone, does not establish an antitrust law violation, we believe the orderly way to proceed is to make the findings in the form proposed by Mid-Am so that such findings may be given appropriate weight and be considered as part of all the facts and circumstances of the case.

including Roland Waters, Dairy Commodity Director from Corning, Iowa, for NFO, Vincent Klosterman, local NFO representative and Clarence Korte of NFO. (Tr. 281-282)

42. The Square Deal Board of Directors meeting was in session, when Schaufelberger's secretary informed him that some people outside the office wanted to talk to Schaufelberger; Schaufelberger went to the door and Waters and Klosterman said to Schaufelberger that they were presenting Square Deal with a list of names and the demand that Square Deal milk producers sign the NFO Master Contract. (Tr. 282-283)[4]

43. Klosterman and Korte were brought into the Board meeting and had a list which they said were names of NFO producers who were going to cancel from Square Deal if it did not sign an NFO Master Contract. (Tr. 347-348; 361)

44. Schaufelberger replied that he would present the request to the Board of Directors and give them an answer. (Tr. 283)

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[4] NFO made the same "irrelevant" objection to Mid-Am's proposed finding of ultimate fact No. 42 as it made to the findings Mid-Am proposed in its paragraphs 39, 40 and 41, which we discussed in the preceding footnote. NFO makes the same "irrelevant" objection to all of Mid-Am's findings as proposed in Mid-Am paragraphs 42 to 67, inclusive, except paragraphs 56 and 57, which are admitted without objection, and paragraph 55, which is denied. The findings proposed by Mid-Am in this group of findings relate to detailed circumstances concerning NFO's efforts to obtain NFO Master Contracts from other cooperatives in the years 1963 and 1964.

We shall make the findings in the language proposed by Mid-Am because NFO's objection is based solely on the ground that the proposed findings are "irrelevant." We do so on the same basis and for the same reasons that we stated in connection with NFO's "irrelevant" objection made to Mid-Am's findings as proposed in paragraphs 39 to 41, inclusive. We make clear, of course, that we do not believe that the factual data contained in those paragraphs establish any antitrust violation or otherwise illegal conduct on the part of NFO.

45. The Square Deal Board of Directors considered the demand of Waters and Klosterman that Square Deal sign an NFO Master Contract, both the Grade A Master Contract and the Manufacturing Grade Contract. (Tr. 283)

46. The Board of Directors at Square Deal considered the NFO Master Contracts for at least an hour, and decided that Square Deal could not sign the Contracts. (Tr. 284)

47. The NFO representatives were very unhappy that Square Deal would not sign the NFO Master Contract. (Tr. 284)

48. In addition to the three NFO representatives that presented the Master Contract to the Square Deal Board, a group gathered in the street in front of the Square Deal office. (Tr. 284)

49. After the Master Contract was presented to the Square Deal Board of Directors by Klosterman, Korte and Waters, the Board thanked them for being there and asked them to excuse themselves while the Board met in executive session; after the Board decided not to sign the NFO Master Contract, Schaufelberger and Hanman went to the front door where a large crowd congregated in the street, blocking traffic. (Tr. 364-365)

50. The crowd was milling around in the street. (Tr. 365-366)

51. Schaufelberger went back to the front door of the Square Deal plant and announced as a large group gathered in the street, that the Square Deal was not going to sign an NFO Master Contract. (Tr. 284)

52. When Schaufelberger announced that Sqaure Deal was not going to sign the Contract, some members of the crowd jeered or booed. (Tr. 285)

53. After Schaufelberger announced that Square Deal would not sign the NFO Master Contract, Klosterman became angry and said that "NFO is going to continue to take away the

members of Square Deal until Square Deal has to take the sign off the door." (Tr. 299-300; 362-366; 888)

54. In the months following that occurrence, approximately 250 producers did terminate their membership in Square Deal. (Tr. 370-371)

55. In 1963, NFO representatives, including Albin Rust, presented a Master Contract to the Nebraska-Iowa Co-op Board of Directors. (Stip. 239)[5]

56. The Nebraska-Iowa Co-op Board members were asked to sign an NFO Master Contract in 1963. (Stip. 240)

57. The Nebraska-Iowa Board members rejected an NFO Master Contract in 1963. (Stip. 241)

58. Harold Johnson testified that "NFO was always threatening." (Tr. 585)

59. The Fergus Dairy Board of Directors voted to sign an NFO Master Contract for milk on May 18, 1964. (Stip. 246)

60. On April 27, 1964, Francis Henry and Don Henry, members of Nemaha County Dairy Committee of NFO, contacted the Nemaha Cooperative Creamery. (Stip. 247)

61. In April, 1964, Francis Henry and Don Henry attempted to negotiate an NFO Master Contract with Nemaha Cooperative Creamery. (Stip. 248)

62. Francis Henry and Don Henry threatened to pull NFO members' milk away from Nemaha Cooperative Creamery if the Co-op refused to sign a Master Contract. The NFO representatives indicated that the milk pulled away from Nemaha

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[5] NFO's denial of Mid-Am's proposed finding in this paragraph on the alleged ground that "Rust position with NFO is not established by the record" is untenable. Mid-Am's proposed finding is in the exact language of paragraph 239 of the stipulation. We accordingly make the finding as proposed.

Co-op would be shipped to plants that had signed NFO contracts. (Trial Stipulation)

63. In 1964, Norbert Connor and some other NFO members ceased to deliver their milk to Viroqua Cooperative Creamery within about two months after Viroqua refused to discuss signing a Master Contract. (Stip. 278)

64. One of the reasons Norbert Connor ceased to deliver his milk to Viroqua in 1964 was because of its refusal to discuss signing a Master Contract with NFO. (Stip. 279)

65. Some time in the early 1960's, Brush Hollow Cheese signed an NFO Master Contract. (Stip. 280)

66. In 1964 Norbert Connor moved his milk from Viroqua to Brush Hollow Cheese because Brush Hollow had signed an NFO Master Contract. (Stip. 281)

67. Some other NFO members moved their milk to Brush Hollow Cheese from Viroqua Cooperative Creamery in 1964 at the same time Connor moved his milk. (Stip. 282)

68. Staley and Shafter met with co-op leaders in 1964 at the Fort Des Moines Hotel; present were representatives of Omaha-Nebraska Co-op; Pure Milk of Chicago; Twin City Milk Producers, Pure Milk of Kansas City; Sioux Valley Milk Producers, and Des Moines Cooperative Creamery. (Stip 260)

69. Oran Lee Staley asked the cooperatives to sign Master Contracts with NFO during the meeting at the Fort Des Moines Hotel in 1964. (Stip. 262)

70. At the Fort Des Moines Hotel meeting in 1964, Staley discussed the general objectives of the NFO and his hope that cooperatives such as the Des Moines Cooperative Dairy would support these objectives. (Stip. 263)

71. Staley commented at the Fort Des Moines Hotel meeting in 1964 attended by NFO and various cooperatives that local cooperatives could not perform bargaining services well

enough to obtain a reasonable price for milk at the producer level in the way an organization that was national in scope, like NFO, could. (Stip. 264)

72. At the Fort Des Moines Hotel meeting in 1964, Staley discussed the marketing agency in common, and indicated that NFO wanted all of the co-ops present to join the marketing agency in common, and that NFO would bargain for the price of the producers' milk, and the co-ops would continue to do the processing. (Stip. 265)

73. [Mid-Am's proposed finding of ultimate fact No. 73 was expressly denied by NFO. It stated:

> 73. In March, 1967 NFO called its milk holding action for the purpose of obtaining contracts for its dairy farmer members and for the purpose of encouraging dairy cooperatives to join the marketing agency in common proposed by NFO. (Stip. 319, 321, 317, 322, 341, 405)

In accordance with the procedures we have established above, in lieu of making the finding in the language proposed by Mid-Am, we find the facts as agreed to by the parties in the paragraphs of the stipulation which Mid-Am cited in support of its proposed finding No. 73.]

73-319. On page 13 of the December, 1960 NFO Reporter, the following paragraph is found:

> The purpose of this holding action must be to increase dairy prices at the farm level, prevent expected dairy price drops; establish contracts that would give stability in the future, and to hope that the pressure exerted would necessitate cooperatives joining in a marketing agency in common that could effectively bargain with big milk handlers nationwide at the processor level.

73-321. [See Finding 75, infra, which is a finding made in the exact language of paragraph 321 of the stipulation.]

73-317. In 1967, Oras Kanerva, Assistant to the NFO Dairy Department Director, believed that it would be easier to obtain Master Contracts during a period of time when buyers were short of milk as a result of a Milk Holding Action.

73-322. During the Milk Holding Action, Oras Kanerva was a member of the NFO Board of Directors. (Kanerva, p. 10-11)

73-341. Some NFO members presented Master Contracts for milk to some cooperative and proprietary companies during the course of the Milk Holding Action.

73-405. [See Finding 86, *infra*, which is a finding made in the exact language of paragraph 405 of the stipulation.]

74. It was the belief of some members of NFO's dairy department in early 1967 the plants would be more anxious to sign master contrats if their milk supply diminished or increased as a result of NFO activity. (Stip. 316, 317, 268)

75. In 1967, it was Oras Kanerva's belief that it was the intent of the NFO Dairy Department, by diminishing volumes of milk, to put pressure on plants to sign Master Contracts and therefore become prospective members of NFO's proposed agency in common. (Stip. 321)

76. NFO dairy leaders in 1967 knew that if a dairy holding action was to have any effect in large portions of the country, a substantial volume of Grade A milk would have to be withheld from purchasers on the market. (Stip. 332)

77. NFO encouraged dairy farmers who were NFO members to withhold their milk from the market and encouraged other dairy farmers to sign an NFO membership agreement and then withhold their milk from the market. This latter encouragement was done even though the NFO membership agreement specifically excluded from its terms commodities which the farmer had under contract to others at the time of joining NFO. (Stip. 26, 327, 332, 333, 335, 336, 337, 338, P. Ex. 226)

78. Square Deal Milk Producers and Producers Creamery Company of Springfield, Missouri had written membership and marketing contracts with the dairy farmers delivering milk to them during 1967. These agreements committed the

dairy farmer member to market all of his milk produced on his farm through the cooperative association. (D. Ex. 1083, Tr. 938, 953)

79. The NFO dairy department believed that the holding action would be more effective if NFO had a substantial number of its members in milk cooperatives. (Stip. 312)

80. NFO leaders knew in 1967 that some milk cooperatives in the Middle West had written membership and marketing agreements with some of their members . (Stip. 333, 249, 250, 251, 252)

81. During the 1967 milk holding action NFO members picketed some co-op and proprietary milk plants, and some NFO members and some non-members of NFO withheld their milk from the market. (Stip. 339, 377, 400, 402, 336)

82. . [Mid-Am's proposed finding of ultimate fact No. 82 was expressly denied by NFO. It stated:

> 82. The milk holding action commenced on March 15, 1967 and lasted a month to six weeks. (Stip. 310, 311, 344)

In lieu of making the finding in the language proposed by Mid-Am, we make substitute findings in the language of the paragraphs of the stipulation relied upon by Mid-Am.]

82-310. The Milk Holding action was sponsored by the NFO, Inc.

82-311. The NFO Milk Holding Action commenced at 4:00 p.m., on March 15, 1967.

82-344. The NFO Holding Action of 1967 lasted a month to six weeks. (Shafer, p. 255)

83. During the milk holding action, milk was withheld from Twin City Milk Producers Association, Des Moines Cooperative, Nebraska-Iowa Cooperative, Sanitary Milk Producers, Nemaha Cooperative Creamery and Fergus Dairy, all predecessors of the plaintiff. (Stip. 348, 356, 364, 375, 388, 389)

84. Pickets were placed at Twin City Milk Producers Association and Producers Creamery Company's Cabool, Missouri plant during the NFO holding action. (Stip. 377, 400)

85. [Mid-Am's proposed finding of ultimate fact No. 85 was expressly denied by NFO. It stated:

> 85. During the holding action NFO representatives attempted to negotiate master contracts with Mid-Am predecessors. (Stip. 355)

In accordance with the procedure and practice described under paragraph 9, above, we make the findings agreed to in the stipulation in lieu of Mid-Am's proposed finding of ultimate fact No. 85.]

85-355. While milk was being withheld during the 1967 NFO Holding Action, NFO Master Contracts were presented to the Des Moines Milk Cooperative. (R. Nelson, p. 573, L. 9-13)

86. Some of the stated purposes of the 1967 Milk Holding Action were to raise the price of milk paid to dairy farmers and to strengthen NFO's bargaining position, which would help NFO to write contracts which would assure better milk prices for farmers in the future. (Stip. 405)

87. The purpose of the NFO Holding Action of 1967 was to hold milk until contracts which fixed the price of milk could be signed. (Tr. 87-88)

88. [Mid-Am's proposed finding of ultimate fact No. 88 was expressly denied by NFO. It stated:

> 88. NFO's own economic expert, Nathan, admitted that the NFO Holding Action of 1967 was a boycott if the purpose was to hold milk until contracts could be signed. (Tr. 1343)

NFO's denial, based on the ground that the witness was not competent to testify in regard to the legal conclusion stated, is sustained. NFO was given a continuing objection to all questions which called for the expression of a legal conclusion by this witness. (Tr. 1340) NFO's objection is sustained and we

therefore refuse to make the finding of ultimate fact as proposed by Mid-Am in paragraph 88.]

89. At the time of the Milk Holding Action, NFO wasn't even engaged in marketing or selling milk. (Stip. 411)

90. Even though NFO did obtain a number of master contracts from proprietary and cooperative dairy plants during the period 1960 through the 1967 Holding Action, NFO did not attempt to activate these contracts as the required percentage of milk necessary to activate them was never achieved. (Stip. 193, 196, 197)

91. [Mid-Am's proposed finding of ultimate fact No. 91 was expressly denied by NFO. It stated:

> 91. While maintaining the goal of activating master contracts, NFO inaugurated a program after the 1967 holding action of Milk Supply Contracts whereunder NFO would encourage its dairy farmer members to deliver their milk to dairy plants signing such a contract. (Stip. 423, 430-435, 445, 447-451, 475)

In accordance with the procedure and practice described under paragraph 9, above, we make the findings agreed to in the stipulation in lieu of Mid-Am's proposed finding of ultimate fact No. 91.]

91-423. During the latter days of the 1967 NFO Milk Holding Action, Shafer, Sinclair and others began to prepare documents for the implementation of the NFO Phase II "Store and Hold" Program.

91-430. In order to effectuate the Phase II—Store and Hold program, NFO members were requested to sign a document known as the "Milk Processing & Sales Agreement," Form 7-3-39. (Ochsner, p. 797-798)

91-431. The NFO Store and Hold program was never implemented successfully. (Ochsner, p. 806)

91-432. The Milk Processing & Sales Agreement (Form 7-3-39) was signed by an NFO member and authorized NFO to negotiate on the member's behalf with a manufacturing plant

for the receipt, manufacturing and storing of the finished product in conjunction with the NFO Store and Hold Program.

91-433. As part of the Store and Hold Program, the farmer members of NFO were asked to sign a document known as "Authorization to Plant Operator," Form 7-3-38.

91-434. The Authorization to Plant Operator was signed by the NFO member and delivered to a manufacturing plant for the purpose of indicating to the plant the willingness of the NFO member to participate in the Store and Hold Program and to indicate that the particular producer had authorized a deduction of $.03 per cwt. from any payment due him from the manufacturing plant to go to NFO, Inc.

91-435. NFO's dairy program immediately following the Store and Hold was known to some as "Phase II with a Plus."

91-445. In 1968 NFO went to a Supply Contract Program in milk.

91-447. In 1968 and 1969 in order for the NFO member who was shipping his milk to a plant that had signed an NFO Phase II Milk Supply Contract to participate in the contract price he had to sign some form of an NFO agreement—Milk Processing and Sales Agreement Form 7-3-39, Authorization to Plant Operator Form 7-3-38, Milk Sales Agreement Form 7-3-39A.

91-448. If an NFO member had not signed an NFO supplemental milk sales agreement, that member was not considered to be participating in a Phase II Milke Supply Contract and was not counted by a processor or handler under such a contract and no additional sum was paid for his milk.

91-449. In 1968 and early 1969, Henry Ochsner contacted milk processors in Wisconsin for the purpose of negotiating NFO Phase II milk Supply Contracts. (Ochsner, p. 770)

91-450. Negotiation of Phase II Milk Supply Contracts commenced in or about 1968 after NFO decided to stop attempting to negotiate Master Contracts in Milk. (Ochsner, p. 775-76)

91-451. Most of the Supply Contracts negotiated by NFO in 1968 and early 1969 contained a provision stating that "for services rendered" buyers shall pay the sum of ____ cents per cwt. in addition to the base price under the contract. (Ochsner, p. 799)

91-475. It has been NFO's policy to encourage NFO members to support plants that have signed Phase II Milk Supply Contracts with NFO. (Connor, p. 1028-1031)

92. [Mid-Am's proposed finding of ultimate fact No. 92 was expressly denied by NFO. It stated:

> 92. Common to the milk supply contracts was a provision that the receiving plant would pay NFO members the same base amount for their milk as all other dairy farmers delivering to the plant, plus an additional sum of money per hundred weight of milk delivered under the guise of payment "for services rendered." (Stip. 479-560, 451)

Paragraph 451 of the stipulation is already set forth as finding 91-451, supra. Paragraphs 479 to 560 of the stipulation need not be set forth as separate findings. Those paragraphs of the stipulation simply reproduce particular paragraphs of numerous contracts which NFO negotiated in 1969 and 1970 (one contract, reproduced in paragraph 560, was negotiated in 1972).

We find and conclude that the provisions of those contracts do not support finding No. 92 as proposed by Mid-Am. The contracts say nothing about the price to be paid non-NFO members. Nor do they provide that NFO members be paid more for their milk than non-NFO members. We find that all the other evidence relied upon by Mid-Am, including but not limited to the trial testimony of witnesses Powell and Nathan cited by Mid-Am in its reply to NFO's denial, is insufficient to support Mid-Am's proposed finding No. 92. We therefore refuse to make that proposed finding but incorporate paragraphs 479 to 560, inclusive, of the stipulation as a part of our findings of fact by this reference.]

93. In presenting these milk supply contracts to dairy cooperatives, NFO sought to have the cooperatives continue to market the milk either in fluid form or as manufactured dairy products and to recognize NFO as the bargaining agent for its members insofar as the price to be received by NFO members from the cooperative was concerned. (Tr. 931, 941) (Stip. 592, 598, 607)

94. [Mid-Am's proposed finding of ultimate fact No. 94 was expressly denied by NFO. It stated:

> 94. Many dairy cooperatives, including Mid-Am and some of its predecessors, resisted the NFO milk supply contracts on the basis that it caused them to discriminate among their dairy farmer patrons without reasonable justification, that such discriminatory payments would result in all members of the cooperative joining NFO solely for the purpose of obtaining a higher price than other patrons and on the further ground that the cooperative members had already granted bargaining rights to the cooperative for the dairy farmers' milk.

Mid-Am did not initially cite any portion of the record to support its proposed finding 94. When NFO denied that there was any factual basis for the proposed finding of discrimination, Mid-Am cited the portions of the contracts stipulated in paragraphs 481 to 560 of the stipulation. Mid-Am thereafter replied by citing the same pages of testimony of witnesses Powell and Nathan which Mid-Am cited in reply to its attempt to support its proposed finding 92, added a citation to page 167 of witness Birdsall's trial testimony, and directed attention to the Robinson-Patman portions of its post-trial brief.

We have reviewed the additional supporting data cited by Mid-Am and adhere to our similar finding made in regard to plaintiff's proposed finding 92, namely, that Mid-Am has not carried the burden of proving the fact of discrimination as proposed in Mid-Am's proposed finding of ultimate fact 94.]

95. Norbert Connor, Alan Skroch, Cletis Timmmerman, and Henry Ochsner, NFO employees, attended the meeting

with Mr. Schultz and other representatives of the Wisconsin State Department of Agriculture in June, 1969. (Stip. 593)[6]

96. The Wisconsin Department of Agriculture sent a letter dated October 1, 1969 to each dairy plant licensed in Wisconsin stating that payment under NFO Phase II Milk Supply Contracts of a sum "for services rendered" would probably constitute a violation of the plant operator's duties under Section 100.22, Wisconsin Statutes, and could therefore jeopardize their state license to operate a dairy plant. (Stip. 581)

97. The Wisconsin Department of Agriculture sent a letter to Mr. Kenneth L. Olson, Manager, Western Wisconsin Dairies Cooperative, Blair, Wisconsin, on September 16, 1969, stating that the Department woud take the position that payments made "for services rendered" pursuant to NFO Phase II Milk Supply contracts would constitute a price discrimination by the dairy plants under Section 100.22, Wisconsin Statutes. (Stip. 582)

98. In September, 1969, the Wisconsin Department of Agriculture gave its opinion to NFO that the problem for the Wisconsin dairy plants with the NFO Phase II Milk Supply Contracts under the Wisconsin statutes could be remedied by a specific and clear provision indicating that NFO was purchasing the milk from the producer and, in fact, taking legal title to the milk of its members prior to resale pursuant to the Phase II Milk Supply Contract. (Stip. 583)

99. In late 1969 and early 1970, several meetings were held between NFO representatives, including Ed Graf, and representatives of the Wisconsin Department of Agriculture con-

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[6] NFO objects to the relevancy of proposed finding 95 and all findings proposed in Mid-Am's paragraphs 96 to 109, inclusive. All the findings proposed by Mid-Am in this group are supported by the cited paragraphs of the stipulation. We therefore make the findings as proposed but we have given the undisputed factual circumstances the weight we believe such findings deserve in light of all the other facts and circumstances of the case.

cerning the possible effect of the NFO Phase II Milk Supply Contracts on the requirements for dairy plants licensed by the State of Wisconsin. (Stip. 594)

100. The matter under discussion between representatives of NFO and the Wisconsin Department of Agriculture related to the provisions of the NFO Phase II Milk Supply Contracts which provided for a sum to be paid for "services rendered," which provision, under the Department's interpretation of the contract, might result in an individual dairy plant paying different prices to NFO members and non-NFO members. (Stip. 595)

101. During meetings between NFO representatives and the Wisconsin Department of Agriculture prior to February 10, 1970, one proposal discussed and given tentative approval by the Department of Agriculture was the creation of a third party legal entity to purchase the milk from NFO producers pursuant to a specific purchase agreement. (Stip. 596)

102. Prior to February 10, 1970, possible solutions to the questions raised by the Wisconsin Department of Agriculture, including the possibility of establishing a third party legal entity to purchase and resell the milk of NFO member-producers, were discussed by NFO members and staff employees at various meetings including county meetings throughout the State of Wisconsin. (Stip. 597)

103. NFO considered the proposal for a third party legal entity to purchase and resell its members' milk in part because in 1969 and early 1970, the NFO did not want to purchase milk from its members but wanted to remain a bargaining association negotiating for the sale of its members' milk and other agricultural commodities. (Stip. 598)

104. In late 1969 and early 1970, NFO was discussing establishment of a third party legal entity to purchase and sell the milk from NFO members in Wisconsin because NFO was not a processing organization and did not want to go into business. (Stip. 599)

105. Ricardo Avila attended at least one of the conferences between NFO leaders and the Wisconsin Department of Agriculture relating to the NFO Phase II Milk Supply Contracts in Wisconsin. (Stip. 600)

106. The Attorney General of Wisconsin was of the opinion that dairy plants who had signed NFO Phase II Milk Supply Contracts might violate Wisconsin Statute 100.22 by paying without justifiction different prices to the producers supplying milk to the contracting plant. (Stip. 601)

107. On February 10, 1970, the Wisconsin Department of Agriculture advised NFO that the Attorney General of Wisconsin had concluded that even if a third party legal entity purchased NFO member milk and resold it to dairy plants operating under an NFO Supply Contract, in his opinion those dairy plants would still not be in compliance with the licensing provisions of Wisconsin law. (Stip. 590)

108. In September, 1969, it was the tentative opinion of the Minnesota Department of Agriculture pending completion of a legal investigation that performance by dairy plants under the NFO Phase II Milk Supply Contract might violate Minnesota Statute 32.11 pertaining to discrimination in the purchase of milk provided there had been economic injury to someone. (Stip. 602)

109. In April, 1969 MPI turned down the NFO Supply Contract and in June, 1969, Turtle Lake Co-op, Five Star Co-op and Mid-Am refused to sign a supply contract. (Stip. 603-612)

110. [Mid-Am's proposed finding of ultimate fact No. 110 was expressly denied by NFO. It stated:

> 110. In late 1969 Ed Graf, director of the NFO Dairy Department, reported to the NFO Board of Directors that he had been unsuccessful in achieving NFO's goal of marketing NFO's members' milk through cooperative dairy associations and requested permission to set up milk reload stations to gain flexibility in bargaining. (Stip. 638, 650, 652)

In accordance with the practice above established, and in lieu of the proposed finding, we make supplemental findings of fact based on the cited paragraphs of the stipulation:]

110-638. Prior to January, 1970, Graf reported to the NFO Board of Directors that the NFO was unable to achieve its goal by marketing members' milk through existing cooperative dairy associations or its predecessors, and as a consequence, it was necessary for NFO to formulate a reload marketing system.

110-650. The principle of marketing milk through reloads was to establish the flexibility to ship milk outside the local area where it had previously been purchased.

110-652. As a result of the flexibility of being able to ship milk out of the local area, NFO, in establishing the Mountain Grove reload, had as one of its purposes to increase interest in bidding for the milk in the Missouri area where the milk was normally purchased.

111. The first NFO dairy reload was opened in Mountain Grove, Missouri in late January or early February, 1970. (Stip. 640, 651, 700)

112. NFO opened its Jefferson City, Missouri reload in February, 1970. (Stip. 641)

113. NFO opened its Springfield, Missouri reload in January, 1971. (Stip. 780)

114. In opening the Missouri Grove reload and the Jefferson City, Missouri reload and Springfield, Missouri reloads, NFO solicited dairy farmer members of Mid-Am in Central and Southwest Missouri to cease delivering their milk to Mid-Am and to permit NFO to direct the shipment and sale of their milk. (Stip. 669, 670, 671, 679, 694, 695, 698, 710, 711)

115. Numerous dairy farmers in Missouri and several in Illinois left Mid-Am in 1970 and early 1971 in order to move their milk under the NFO milk program. (P. Ex. 97, 98, 99, 201)

116. These dairy farmers commenced delivery of their milk to plants pursuant to NFO's direction.

117. Some of these dairy farmers may have failed to give timely notice of termination of their membership and marketing contracts with Mid-Am.[7]

118. In early 1971 a letter was prepared by NFO legal counsel and distributed by NFO employees among some of the dairy farmers who had left Mid-Am.

119. These letters of termination may have been ineffective as the dairy farmers involved may have already been in breach of their contracts with Mid-Am at the time the notices were mailed to Mid-Am.

120. The live witnesses Stacey, Douglas and Forbes testified that they left Mid-Am to go into the NFO milk program. Each was generally unconcerned about giving any notice of termination to Mid-Am. There is not sufficient factual data in the record to determine whether those three persons and, particularly, whether the unidentified "dairy farmers" mentioned in findings 115, 116 and 117 were or were not under legal duty to give Mid-Am any written notice of termination before electing to ship their milk through NFO.

121. [Mid-Am's proposed finding of ultimate fact No. 121 was expressly denied by NFO. It stated:

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[7] Mid-Am initially cited two pages (Tr. 742-743) of the trial testimony of witness Powell and a single page (Tr. 859) of the testimony of witness Hackler to support proposed findings of ultimate fact Nos. 117 to 120. Additional pages of the trial transcript were cited in Mid-Am's reply to NFO's denial of all four paragraphs. The findings proposed by Mid-Am in those three paragraphs are not supported by the cited testimony.

We have therefore modified the findings proposed by Mid-Am in each of those four paragraphs consistent with all the evidence adduced by Mid-Am. It is to be recognized that the modified findings of fact as made, however, do not significantly add to the quantum of Mid-Am's proof.

121. NFO employees working in Missouri in 1970 and 1971 knew that virtually all of the grade A dairy farmers in Central and Southwest Missouri belonged to Mid-Am. (Stip. 670, 694, 698)

In lieu of Mid-Am's proposed finding of ultimate fact No. 121, we find the facts as agreed to by the parties in the paragraphs of the stipulation which Mid-Am cited in support of its proposed finding No. 121:]

121-670. In September, 1969, all of the NFO members producing Grade A milk in Wright County, Missouri that T. Forbes knew were shipping their milk through Mid-Am.

121-694. In late 1969 or early 1970 when Hills was contacting dairy farmers who were NFO members, Hills was aware that all Grade A dairy farmers in the Mountain Grove area were shipping their milk through Mid-Am.

121-698. In late 1969, Hills believed that most of the dairy farmers from the Mountain Grove area who attended the NFO organizational meetings had marketing commitments with Mid-Am.

122. [Mid-Am's proposed finding of ultimate fact No. 122 was expressly denied by NFO. It stated:

122. NFO's employees contacted these dairy farmers and encouraged them to deliver their milk to plants which NFO had agreements with and these same employees worked under the stated policy that they were not to bring up the question of whether or not these dairy farmers had membership and marketing agreements with Mid-Am or anyone else. (Stip. 685, 693, 696)

In lieu of Mid-Am's proposed finding of ultimate fact No. 122, we find the facts as agreed to by the parties in the paragraphs of the stipulation which Mid-Am cited in support of its proposed finding No. 122:]

122-685. In early 1970, Bruemmer did not initiate discussion concerning cooperative membership agreements with milk producers as long as the producer contacted by him had

signed an NFO membership agreement prior to the time that Bruemmer contacted the producer.

122-693. In late 1969 or early 1970, Hills did not intitiate discussion concerning cooperative membership agreements with milk producers as long as the producer contacted by him had signed an NFO membership agreement prior to the time that Hills contacted the producer.

122-696. From late 1969 through early 1971, Ralph Bruemmer and Herman Hills did not initiate discussion of cooperative membership agreements with milk producers whose milk was being sought for NFO's dairy program as long as the producer contacted had signed an NFO membership agreement prior to the time he was contacted.

123. Many dairy farmers were contacted by NFO employees and within a matter of days these same dairy farmers ceased delivering their milk to Mid-Am. (Stip. 1247, 1374, 1250, 1375, 1262, 1400, 1265, 1402, 1266, 1403, 720, 721, 1409) [The stipulated facts show that a matter of several *weeks*, rather than "a matter of *days*," was involved.]

124. NFO knew that Mid-Am had agreements of some kind with its producer members as even NFO developed a written contract for marketing milk under federal milk marketing orders. (Stip. 671, 694, 698, 870, 871, 872, 886)

125. NFO's purpose in setting up milk reload stations in Central and Southwest Missouri was to establish flexibility to ship milk out of the local area where it had previously been purchased and to increase interest in bidding for the milk where it was normally purchased. (Stip. 650, 652)

126. The normal purchaser of this milk had been Mid-Am.

127. [Mid-Am's proposed finding of ultimate fact No. 127 was expressly denied by NFO. It stated:

> 127. NFO never changed its goal of bargaining with milk marketing cooperatives and the Missouri reloads were only a part of its plan to accomplish this goal. (Stip. 638, 47, 70, 163) (Tr. 930-931)

In lieu of Mid-Am's proposed finding of ultimate fact No. 127, we find the facts as agreed to by the parties in the paragraphs of the stipulation which Mid-Am cited in support of its rejected proposed finding No. 127. We further find that pages 930-931 of witness Hanman's testimony do not support Mid-Am's proposed finding.]

127-638. [See Finding 110-638 above.]

127-47. NFO's principal activity is collective bargaining, not marketing. (Tax Protest)

127-70. NFO's milk marketing activities take the form they do only because the Federal Milk Order program requires a qualified association of producers to conduct a specified degree of "marketing" activities; NFO performs only those marketing activities absolutely required by the government for qualified milk operations, and its marketing assistance activities are far less than those engaged in by most qualified associations representing milk producers; and milk operations represented only a small percentage of NFO's overall activities during the period 1970-1972.

127-163. A goal of NFO is contracts, such as are referred to in the Membership Agreement, Article VI, Section 1, which are contracts with processors.

128. In 1970 NFO offered to sell milk to customers of Mid-Am located in Springfield, Missouri and Fayetteville, Arkansas at lower prices than the then existing Mid-Am price. (Stip. 1197, 1198, 1199, 1200, 1201, 1202)

129 to 131. [Mid-Am's proposed findings of ultimate fact as proposed in paragraphs 129 to 131, inclusive, were expressly denied by NFO. Those three paragraphs, all of which relate to the October, 1970 meeting in John Gage's law office, state:

> 129. In October, 1970, after many members of Mid-Am had already breached their Membership and Marketing Agreements with Mid-Am, NFO and Mid-Am officials met to discuss the problem of contract breaches by Mid-Am producers. (Tr. 929-931, 736-740, 742)

130. At this meeting NFO indicated that it would get out of marketing and let Mid-Am market the milk of the Missouri NFO dairy farmers if Mid-Am would recognize NFO's bargaining rights by entering into a discriminatory milk supply contract paying NFO members more money for their milk than Mid-Am's non-NFO members. (Tr. 739-740, 930-932)

131. When Mid-Am refused to enter in such a contract with NFO, NFO's representatives indicated that they intended to destroy Mid-Am and pick up the pieces. (Tr. 739-741, 931)

Mid-Am's "post-trial proposed findings of fact" contained many more paragraphs relating to the October, 1970 meeting in John Gage's law office than were proposed in its "proposed findings of ultimate facts and proposed conclusions of law." NFO, in Appendix B to NFO's post-trial answer brief, admitted a substantial number of the findings of fact thus proposed by Mid-Am in its post-trial proposed findings of fact. We therefore make additional findings of undisputed fact in lieu of the rejected findings proposed in paragraphs 129 to 131.

Those facts will be numbered "129-1249;" "129-1250," etc., to indicate paragraph 129 of Mid-Am's proposed findings of ultimate fact and paragraphs 1249 and 1250, etc., respectively, of the paragraphs of Mid-Am's post-trial proposed findings of fact which were admitted by NFO. We make those additional findings before further footnote discussion of the October, 1970 meeting in John Gage's office.]

129-1249. In October, 1970, a meeting was held in John Gage's office in Kansas City; present were Graf and Shafer for NFO, Johnson, Hanman, Powell and Gage for Mid-Am.

129-1250. In 1970, Powell attended a meeting in the office of John Gage, attorney for Mid-Am, in which matters between NFO and Mid-Am were discussed. (Tr. 736)

129.1251. Gage was attorney for Mid-Am. (Tr. 737)

129-1252. Graf was dairy Marketing Director of NFO or some title similar to that. (Tr. 737)

129-1253. Shafer was a representative of NFO. (Tr. 737)

129-1254. Mid-Am called the meeting. (Tr. 737, 738)

129-1255. Gage led off the meeting, explaining Mid-Am's mergers, and Mid-Am's policy in relation to marketing Grade A milk, which was to get the highest price possible for the producers at the farm. (Tr. 738)

129-1256. The meeting was called to discuss apparent conflicts between Mid-Am and NFO with respect to the marketing rights of certain dairy farmers located in central, southern, and southwest Missouri. (Tr. 930)

129-1257. One issue involved was whether or not those members had delegated their mareketing and bargaining rights to Mid-Am or to NFO. (Tr. 930)

129-1258. The purpose of the October, 1970 meeting was to discuss the conflicting views of Mid-Am and NFO in regard to the marketing rights of certain dairy farmers who happened to be members of both organizations. (Tr. 982)

129-1259. Shafer did most of the talking for NFO, and explained NFO's goals. (Tr. 738, 739)

129-1260. A discussion in regard to what NFO was trying to do as far as marketing and bargaining took place. (Tr. 930, 931)

129-1261. There was a discussion as to what Mid-Am was trying to do in marketing and bargaining. (tr. 931)

129-1266. At the Gage office meeting in October, 1970, Shafer took the position on behalf of NFO that NFO had "prior membership rights" by virtue of the fact that certain producers had signed NFO Membership agreements prior to the time they had signed their marketing Agreements with Mid-Am (Tr. 113); during the trial NFO did not attempt in any way to establish either the fact that any producer had a prior membership agreement with NFO, or that the NFO Membership Agreement granted any kind of marketing right in the milk of the individual producer.

129-1267. Gage stated that Mid-Am could not pay NFO members an additional fee for their milk and under the law, has to treat all producers alike. (Tr. 739)

129-1269. Mid-Am's "problems in the country" was the solicitation by NFO of Mid-Am membership to violate their Mid-Am agreements and immediately going with NFO. (Tr. 742)

129-1273. NFO's position at the October, 1970 meeting disputed Mid-Am's claim to the marketing rights on two grounds: first, that some particular dairy farmers had in fact terminated any legal obligation they had with Mid-Am and, secondly, that some dairy farmers had, in fact, entered into what NFO viewed as a prior contractual agreement with NFO before they had signed with Mid-Am. (Tr. 983, 984)

129-1274. At the October, 1970 meeting held at Gage's office the Mid-Am representatives refused to sign an NFO Supply Contract.

129-1275. At the October, 1970 meeting at the Gage office, Shafer cannot recall any discussion of Mid-Am wanting to find a way to get along with NFO. (Tr. 143)

129-1276. Shafer cannot recall but would not say specifically that an NFO Supply Contract was not mentioned at the meeting. (Tr. 121-122)

129-1277. Mid-Am's response was that Mid-Am couldn't legally follow NFO's suggestion. (Tr. 931)

129-1278. At the October, 1970 meeting held at Gage's office Shafer said that NFO had "been a burr under the saddle of the co-ops and it would just have to continue to be."

129-1279. Shafer admits at that meeting that he stated that NFO would continue to be a "burr under the saddle" of Mid-Am, but cannot remember any other kind of a statement made by him. (Tr. 114, 118, 119)

129-1280. Shafer said that NFO had been a burr under the cooperatives saddle and NFO felt there was no alternative but to continue to be the burr under the saddle. (Tr. 740)

129-1281. Hanman recalls Shafer using the phrase "being a burr under the saddle." (Tr. 931, 932)

129-1282. Hanman believed that Shafer was referring to the co-op's saddle. (Tr. 931, 932)

129-1284. Shafer does not deny stating that if the regional cooperative marketing structure were torn into pieces, NFO would pick up the pieces. (Tr. 119)[8]

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[8] The parties' arguments in their respective briefs about the October, 1970 meeting in John Gage's office and its alleged significance contain a good deal of talk about NFO being a "burr under the saddle" and about NFO's alleged intention "to destroy Mid-Am and pick up the pieces," as Mid-Am proposed in its finding of ultimate fact as proposed in its paragraph 131. NFO admitted paragraph 1282 of Mid-Am's post-trial proposed findings so that there is no factual dispute about the fact that Shafer did say something about NFO's being "a burr under the saddle."

In paragraphs 1283 and 1285 of its post-trial postponed findings, Mid-Am proposed much milder findings than its "destroy Mid-Am and pick up the pieces" finding as proposed in paragraph 131 of its proposed findings of ultimate fact. The findings proposed in those paragraphs stated:

> 1283. Powell said to Shafer: "Gordon, are you going to completely tear down the marketing structure that we have all worked so long to build up?" (Tr. 740, 755, 760, Ex. 101, Tr. 970-971, 979-980)
>
> 1285. Shafer's reply to Powell was: "That is exactly what we are going to do. We will tear it down and we can rebuild it the way we want." (Tr. 740, 741, 754, 755, 759, 760, 931, 970-971, 979-980, Ex. 101)

Mid-Am also proposed a number of other findings in regard to the October, 1970 meeting in its attempt to strengthen its argument that what was said at that meeting would support a finding that NFO intended to and did in fact threaten to "destroy Mid-Am" at that

130. [Covered by findings under paragraph 129 above.]

131. [Covered by findings under paragraph 129 above.]

132. In early 1971 NFO began to offer milk to customers of Mid-Am located in St. Louis, Missouri at lower prices than the then existing Mid-Am price. (Stip. 1203, 1204, 1205, N/S 2563, 2564, 2573)

133. NFO's principal activity is collective bargaining, not marketing. (Stip. 47)

134. NFO's marketing activities are not an end to themselves, but rather the means by which it accomplishes its purpose. (Stip. 52)

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meeting. Typical of those additional findings as proposed in Mid-Am post-trial proposed findings are the following:

> 2194. Gary Hanman, Executive Vice-President of Mid-Am, was present at the meeting at John Gage's office in October, 1970, when statements were made by Shafer and Graf of NFO: Hanman took those statements very seriously, as did the other Mid-Am representatives present. (Tr. 1369)
>
> 2197. No other organization had ever told Mid-Am that it was going to tear up Mid-Am and pick up the pieces, other than NFO. (Tr. 1394)
>
> 2200. A reasonable, prudent man would have taken the statements made by Shafer at the Gage office meeting seriously.
>
> 2213. The statements made at the office of John Gage in October, 1970 by NFO representatives to Mid-Am representatives "unless you sign our contract we will break up Mid-Am and pick up the pieces" are evidence of predatory intent if the threats could be taken seriously. (Tr. 1343-1344)

We find and conclude that Shafer's apparent agreement with Powell's suggestion that the market structure might be torn down and that NFO would rebuild that market structure could not have been reasonably considered as a threat. In short, we find that NFO's denial of Mid-Am's proposed findings in paragraphs 2194, 2197, 2000, and 2213 is consistent with our view that Mid-Am did not carry the burden of proof in regard to those and similar proposed findings.

135. [Mid-Am's proposed finding of ultimate fact No. 135 was expressly denied by NFO. It stated:

> 135. The NFO plan with respect to the dairy industry was designed to interrupt the existing business relationships of the cooperatives and their members and, ultimately, to eliminate the cooperatives from the market of representing dairy producers.

Mid-Am's proposed finding was not initially supported by any reference to the stipulation of the parties or by the citation of any portion of the trial record. Mid-Am's suggestion in its reply brief that the argument Mid-Am presented in the first seven pages of its post-trial brief supports its finding of ultimate fact as proposed in paragraph 135 is untenable. We have considered all of the evidence in the case "as a whole" (p. 1 of Mid-Am's post-trial brief) and have examined all of "the pieces of the jigsaw." We find and conclude that the evidence adduced in the case does not support the proposed finding. We therefore refuse to make the finding as proposed.]

136. The NFO did not undertake itself to market or sell milk or milk products for its members, as functioning cooperatives do.

137 to 145. [Mid-Am's proposed findings of ultimate facts Nos. 137 to 145, inclusive, are all expressly denied by NFO. Those proposed findings state:

> 137. The accomplishment of the NFO objectives with respect to bargaining with dairy cooperatives over prices to be paid to cooperative members would have had profound effect on the dairy cooperatives involved.

138. The restriction or loss of their authority over the pricing and selling of the milk and milk products produced by their members and the manner in which the net proceeds were to be returned to their members concerned the very essence of their operations and organization as cooperative marketing associations.

> 139. Success by NFO in removing from cooperative associations authority over prices paid to producers and

prices received for milk and milk products sold would have eliminated such associations as bargaining agents for producers, thereby achieving NFO's stated purpose with respect to bargaining for all producers of all agricultural commodities, i.e., "all farmers."

140. Since the NFO objective of obtaining contracts from dairy cooperatives would result in the elimination of such cooperatives as bargaining agents for dairy producers with substitution of the NFO as their bargaining agent, the 1967 Milk Holding action was coercive group boycott instigated by the NFO.

141. Such a planned purpose and effect of eliminating competitive bargaining agents for dairy producers renders this activity a per se illegal combination in violation of Sherman 1.

142. The 1967 Milk Holding Action was not a competitive effort.

143. NFO did not engage in the selling or marketing of milk in the Holding Action; the purpose of such movement or dumping and resulting non-delivery of milk during this period was to put greater pressure on certain cooperative associations to sign NFO Master Contracts and to join Nationwide.

144. The NFO 1967 Milk Holding Action did not constitute a reasonable and legitimate attempt by the NFO to develop its own marketing and bargaining program in the competitive field that existed among associations representing dairy farmers.

145. Instead it comprised a scheme for elimination of many such cooperatives, including predecessor cooperatives of Mid-Am, as bargaining agents in achieving what would obviously have been a takeover of the entire dairy bargaining field if NFO had been successful.

None of Mid-Am's proposed findings in paragraphs 137 to 145 were initially supported by any reference to the stipulation of the parties or by the citation of any portion of the trial record. In Appendix A to its reply brief Mid-Am cites the same seven pages of that reply brief upon which it relied in its effort to support its proposed findings 131 and 135. In addition, Mid-Am directed attention to some additional pages of its

post-trial brief in support of its proposed findings No. 138 and 140 to 145 and suggests that the proposition stated in proposed finding No. 139 is "supported by the entire record." We have considered all the additional data and find and conclude that none of the findings proposed in paragraphs 137 to 145 are supported by the record. We therefore reject and refuse to make any of the findings of ultimate fact as proposed in those paragraphs.]

146. NFO officials decided in late 1967 or early 1968 to commence a bargaining program which included the presentation to dairy cooperatives of a "Phase II NFO Milk Supply Contract."

147. The consequences of not signing such a Supply Contract was [sic] that should another dairy plant in the area sign such a contract, NFO would encourage NFO members to voluntarily withdraw and shift their milk from the non-signing cooperative and into the signing plant.

148. Cooperatives must be organized for the "mutual benefit" of their members and as such distribute all gains and losses among the total membership on a patronage basis.

149 and 150. [Mid-Am's paragraphs 149 and 150 are expressly denied by NFO. Those two paragraphs stated:

> 149. To agree to the terms of the NFO Phase II Milk Supply Contract required a departure from cooperative principles and the fiduciary relationship between the entity and its owner-members requiring mutuality and equality of treatment.
>
> 150. In attempting to negotiate NFO Supply Contracts with the dairy cooperatives, NFO was not trying to compete with the cooperatives, but rather to eliminate the cooperatives from their fundamental obligation of returning net proceeds equitably among members and to replace the cooperatives as bargaining agents.

Neither paragraph 149 nor 150, as originally proposed, cited or relied upon either the stipulation of the parties or the transcript of the trial. The pages of witness Powell's testimony cited

in Appendix A of Mid-Am's reply brief to support those two paragraphs, in our judgment, fall far short of doing so. We therefore reject and refuse to make the findings as proposed in Mid-Am's paragraph 149 and 150.]

151. Whitmore Transport Company paid the rent on the NFO Mountain Grove Reload until February 16, 1971.

152. Billy Stacey, while a Mid-Am hauler and member, rented the NFO Springfield Reload in July, 1970. (Stip. 966, 978)

153. Pete Taves, an employee of Food Consultants, Inc., attended meetings in Central and Southwestern Missouri where dairy farmers were told about the NFO Dairy Program. (Stip. 673, 674, 675)

154 to 159. [Mid-Am's findings of ultimate facts as proposed in its paragraphs 154 to 159 commence with the language that "NFO combined with [various] outsiders" who allegedly shared and participated in NFO's alleged "concerted group boycott" and alleged "illegal price fixing." We refuse to make the proposed findings because we do not believe that the paragraphs of the stipulation cited to support those findings can fairly be said to do so. We therefore refuse to make the proposed findings. We shall, however, find as facts the paragraphs of the stipulation which Mid-Am cited in support. The findings we make from the stipulation will be made only once in connection with Mid-Am's proposed finding 154 in light of the fact that paragraphs 155 to 159 rely upon exactly the same paragraphs of the stipulation.

The findings of ultimate fact proposed by Mid-Am which we reject and refuse to make state:

> 154. NFO combined with other corporations, Southwest Milk Producers, Whitmore Transport Company, Food Consultants, Inc., and Midwest Creamery, Inc., to induce or attempt to induce members of Mid-Am to refuse to ship their milk to Mid-Am in violation of their milk marketing agreements, which constituted a concerted

group boycott. (Stips. 673-679, 663-667, 634, 635, 629, 623-628, 823, 976)

155. NFO combined with other corporations, Southwest Milk Producers, Whitmore Transport Company, Food Consultants, Inc., and Midwest Creamery, Inc., to induce or attempt to induce Mid-Am members to breach their milk marketing agreement with Mid-Am, which constituted a concerted group boycott. (Stips. 673-679, 663-667, 634, 635, 629, 623-628, 823, 976)

156. NFO combined with other corporations, Southwest Milk Producers, Whitmore Transport Company, Food Consultants, Inc., and Midwest Creamery, Inc., to induce or attempt to induce Mid-Am members to market their milk through NFO, which marketing constituted illegal price fixing. (Stips. 673-679, 663-667, 634, 635, 629, 623-628, 823, 976)

157. NFO combined with persons not agents or employees of NFO, including Harold Whitmore, Pete Taves and Billy Stacey, to induce or attempt to induce members of Mid-Am to refuse to ship their milk to Mid-Am in violation of their milk marketing agreements with Mid-Am, which constituted a concerted group boycott. (Stips. 673-679, 663-667, 634, 635, 629, 623-628, 823, 976)

158. NFO combined with persons not agents or employees of NFO, including Harold Whitmore, Pete Taves and Billy Stacey, to induce or attempt to induce members of Mid-Am to breach their milk marketing agreements with Mid-Am, which constituted a concerted group boycott. (Stips. 673-679, 663-667, 634, 635, 629, 623-628, 823, 976)

159. NFO combined with persons not employees of NFO, including Harold Whitmore, Pete Taves and Billy Stacey, to induce or attempt to induce Mid-Am members to market their milk through NFO, which marketing constituted illegal price fixing. (Stips. 673-679, 663-667, 634, 635, 629, 623-628, 823, 976)]

154-673. In 1969 Midwest hired Pete Taves to help Midwest obtain a supply of Grade A milk.

154-674. In July of 1969, an NFO dairy committee met with Wilbert Rackers, Doyle Keirn (Midwest) and Pete Taves in Springfield, Missouri. (W. Rackers, p. 17-18)

154-675. In July, 1969, the NFO Cole County Dairy Bargaining Committee and Ric Avila met with Doyle Keirn of Midwest Creamery in Jefferson City, Missouri. (Bruemmer II, p. 15)

154-676. The Midwest/NFO contract of July 19, 1969 was ratified by 39 of 44 NFO producers attending a meeting in July or August, 1969 at St. Thomas, Missouri.

154-677. Graf received a letter dated September 15, 1969 from the Texas Health Department indicating completion of farm inspections of NFO producers with an attached list of dairy producers whose farms had been inspected.

154-678. Henry Rackers, a former milk hauler, who had indicated a willingness to haul milk (farm pick up) for NFO members, was in attendance at a Cole County meeting in September, 1969.

154-679. On June 4, 1974, T. Forbes believed that at NFO organizational meetings held in September and November, 1969, in Cabool and Houston, Missouri, that NFO members having Mid-Am membership agreements and who were in attendance at those meetings were advised to cancel their Mid-Am agreements.

154-663. [See finding of fact 9, supra.]

154-664. Under the Midwest Creamery/NFO July 19, 1969 contract, Midwest could purchase between 3,225,000 pounds and 5,000,000 pounds of Grade A milk and any additional milk by mutual consent of both parties.

154-665. To the extent that Midwest Creamery was able to divert any Grade A milk beyond its Class I bottling needs from its plant to Page Dairy, Midwest Creamery was able to generate a profit of $.10 per cwt. on the diverted milk.

154-666. The Midwest/NFO contract of July 19, 1969 provided that the over-the-road hauler would receive $.50 per cwt. on all milk hauled under the contract.

154-667. The over-the-road hauler during 1970 hauling milk under the Midwest/NFO July 19, 1969 contract was Whitmore Transport, Inc.

154-634. Each National Commodity Trust is a separate entity from NFO., Inc.

154-635. NFO., Inc. is not a beneficiary of the National Commodity Trusts.

154-629. Some NFO officials, including President Oren Lee Staley, used the term "Trust Accounts" and "Custodial Accounts" interchangeably.

154-623. The Dairy Trust of NFO is not marketing milk. (Staley p. 702) (Application of Exemption Tax Status, Document No. 974192-199)

154-624. The NFO Dairy Trust does not bargain for the sale of milk. (Staley p. 705) (Document No. 974192)

154-625. The NFO Dairy Trust does not process milk. (Staley p. 705) (Document No. 974192)

154-626. The NFO Dairy Trust does not handle or sell milk. (Staley p. 705) (Document No. 974192)

154-627. The NFO Dairy Trust was established solely for the purpose of receiving, managing and distributing funds resulting from collective bargaining sales by N.F.O., Inc. (Settler) on behalf of participating members, (Beneficiaries)

154-628. The trustees are authorized by Declaration of Trust to collect, receive, account for and manage all funds for the sale of dairy products, and after deducting marketing expenses, blending or reblending expenses and such additional authorized deductions by written agreement, remitting the net proceeds to the beneficiaries.

154-823. On some of the occasions where the NFO pay price to producers was not competitive with other groups paying farmers for raw milk, the General Fund of NFO paid some of the marketing expenses, thereby leaving more money available in the Dairy Trust to increase the producer pay price.

154-976. The equipment which was installed in the NFO Springfield reload station by Billy Stacey was purchased by an organization identified as the Southwest Milk Producers. (Stacey p. 75)

155 to 159, inclusive. [Paragraphs 155, 156, 157, 158 and 159 cite and rely upon the same paragraphs of the stipulation as those paragraphs identified in paragraph 154 and therefore are not here repeated.]

ULTIMATE FACTS REGARDING NFO NEMBERSHIP CONTRACT AS A TYING ARRANGEMENT

160. To implement the NFO collective bargaining program, NFO and its members enter into a Membership Agreement under which NFO is given the exclusive right to negotiate for and/or collectively bargain in respect to members' commodities (except for those under contract at the time of signing) for contract with processors covering selling price and other conditions of disposal. (Stip. 26)

161. NFO does not collectively bargain for, or give marketing assistance to, anyone other than its members. (Stip. 45)

162. NFO is one of the very few bargaining agencies for farmers producing wheat, corn, milo, soybeans, and other major cash grains. (Stip. 75)

163. NFO is active in every major grain producing area of the country, with bargaining programs for its members in those areas; NFO's procurement area for grain is co-extensive with the main grain producing areas of the country; NFO's sales area, as a bargaining agent is world-wide, NFO having represented its members in sales to such diverse countries as Libya, Japan, and Saudi Arabia. (Stip. 76)

164. The functions performed by NFO under the Supply Contract arrangements for meat and grain consisted primarily of negotiating the terms of the Collective Bargaining Agreement. (Stip. 30)

165. Because of the requirements for qualification under the Federal Milk Order programs, when NFO began to move its members' milk, it operated differently from the way it operated in grain or livestock and in so doing performed a considerably broader range of functions than in grain or livestock. (Stip. 1153)

166. Staley Deposition Exhibit 6, NFO Membership Agreement of Oren Lee Staley, is the same form of Membership Agreement that NFO has used since autumn, 1958; except that the provision for dues and fees has increased from $25 annually to $75 annually. (Stip. 1165)

167. Even though the dairy farmer who is not a member of NFO has a cooperative marketing contract for his milk with another organization, NFO will still ask that individual to become a member of NFO by signing a Membership Agreement. (Stip. 159)

168. In 1974 at the NFO National Convention, President Staley, in a speech to the membership, stated that NFO was out to block or unite enough production, 30%, under control of NFO members, so that those members can hold meetings across the nation, and name their price, and if the price wasn't paid, to hold the production. (Stip. 162)

169. Since 1958, NFO has stated that its underlying and primary purpose has been to obtain for producers of agricultural products their cost of production plus a reasonable profit, and NFO has sought, among other things, to get enough producers to join NFO and put together enough production to realize this purpose. (Stip. 164)

170. In 1968 and to date, it was and is a goal of NFO to contact every farmer, including every dairy farmer, in the United States and ask him or her to become a member of NFO. (Stip. 173)

171. Since the early 1970's it has been NFO's belief that in order to fulfill its purpose of collective bargaining for agriculture, its members must block their production together in NFO and move their commodities through the NFO Nationwide Collection, Dispatch and Delivery System. (Stip. 440)

172. In late 1969, either Avila or Scott told Forbes that the NFO membership agreement took precedence over the Mid-Am membership agreement as far as the right to market milk if the NFO agreement had been signed first. (Stip. 671)

173 to 183. [Each of the paragraphs in this groups of proposed Mid-Am findings are stated in the exact language of the paragraph of the stipulation cited in support. NFO therefore admits, as it must, the truth of each paragraph but objects that such admitted factual data is irrelevant. While we agree that the proposed findings do not establish a factual basis which supports Mid-Am's tying arrangement claim, we shall make the findings as proposed in this group of proposed findings in the language of the stipulation so that the record is clear that we have considered the factual data stated in those paragraphs of the stipulation, together with all other facts and circumstances in our process of finding and concluding that Mid-Am's tying arrangement arguments are untenable.

We shall make additional "tying arrangement" findings of fact as proposed by NFO in paragraphs 105 to 113 of its proposed finding of fact in the course of our discussion of what conclusions of law should be made in regard to Mid-Am's tying arrangement claim.]

173-1155. NFO, as bargaining agent, has arranged for the sale of in excess of $100,000,000 grain for its members annually since 1969. (Tax protest)

174-1156. NFO, as bargaining agent, has arranged for the sale of members' livestock in amounts no less than $500,000,000 annually. (Tax protest)

175-91. NFO reported on Form DA-24 to the United States Department of Agriculture that as of September 30,

1973, NFO had the following number of Grade A producers pooled on the following Federal Orders:

Order No.	Market	A Producers
1	Boston	218
2	New York-New Jersey	185
4	Middle Atlantic	45
15	Connecticut	9
30	Chicago	565
32	Southern Illinois	38
33	Ohio Valley	407
	Wisconsin	71
36	Eastern Ohio and Western Pennsylvania	366
40	Southern Michigan	100
46	Louisville-Lexington-Evansville	173
49	Indiana	27
62	St. Louis-Ozarks-	
	Wisconsin	84
	Minnesota	50
	Missouri	146
64	Greater Kansas City	4
68	Minneapolis-St. Paul (MN)	496
98	Nashville	114
106	Oklahoma-Nebraska	10
	Missouri	33
126	North Texas	25
136	Great Basin	8
	(Unregulated)	7
137	Eastern Colorado	14
	(Unregulated)	21
	Total Grade A Producers— DA-24 Form, Sept. 30, 1973	3,216

176-92. NFO reported on Form DA-24 for the fiscal year ended September 30, 1973 to the United States Department of

Agriculture that, in addition to the Grade A active producers by individual markets set out on that DA-24 Form, NFO had other members in 134 plants who were participating in its dairy program.

177-1157. The service of NFO in bargaining for the sale of meat and grain is unique. (Staley p. 720)

178-1158. NFO's service in bargaining for the sale of grain and meat is beneficial to farmers. (Staley p. 720)

178-1159. NFO's service in bargaining for the sale of grain and meat is desirable for farmers. (Staley p. 720)

180-1160. In NFO's opinion, NFO activities have contributed to increasing the producers' proceeds in the sale of grain.

181-1161. In NFO's opinion, NFO activities have contributed to increasing the producers' proceeds in the sale of hogs.

182-1162. In NFO's opinion, NFO activities have contributed to increasing the producers' proceeds in the sale of cattle.

183-1170. NFO has on occasion had an upward effect on the price for meat received by producers.

184. The NFO "Think Thirty" program is an attempt by NFO to organize the producers who control 30% of all agricultural production in the United States, including dairy production, and to get those producers to move that production through the NFO collection, dispatch and delivery system. (Stip. 160)

185. In December, 1974, or January, 1975, the NFO instituted its THINK 30 program. (Stip. 161)

186. The primary purpose of NFO is to give farmers an opportunity to unite so that they can compete with large companies and achieve cost of production plus a reasonable profit. (Stip. 165)

187. NFO now believes that it would take about 30% of total national production in order for farmers to be able to price their products. (Stip. 169)

188. Since the early 1970's, NFO has believed that in order for its members to obtain the cost of production plus a reasonable profit a sufficient number of producers of agricultural commodities must block their production together in NFO and move that production through the NFO Nationwide Collection, Dispatch and Delivery System. (Stip. 439)

189. If a farmer member of NFO doesn't market all of his commodities which he can market through NFO, he is not doing all that he can to help attain the ultimate purpose of NFO, cost of production plus a reasonable profit. (Stip. 441)

190. If a dairy farmer member of NFO doesn't market all of his dairy commodities which he can market through NFO, he is not doing all that he can to help attain the ultimate purpose of NFO, cost of production plus a reasonable profit. (Stip. 442)

191. NFO did not act as a principal in 1968 sales of its members' grain and livestock; in connection with such sales, NFO performed, among other services, the service of bargaining for the contractual price at which the members' commodities would be sold. (Stip. 1151)

192. In connection with the sale of an NFO members' grain or livestock, NFO, acting as agent and not as principal, negotiates the terms of the sale and otherwise assists the farmer who owns the grain or livestock. (Stip. 1152)

193. NFO did not bargain for the sale of grain for non-members; in order to become a member, a producer must sign an NFO Membership Agreement. (Stip. 1163)

194. NFO does not bargain for the sale of livestock for non-members; in order to become a member, a producer must sign an NFO Membership Agreement. (Stip. 1164)

195. Between May 15, 1969 and November 10, 1969, NFO claims to have raised the Minnesota-Wisconsin series price

from four dollars and twenty-eight cents ($4.28), when the first Supply Contract was signed, to four dollars and fifty-eight cents ($4.58) with no raise in government support price during that time, i.e., a raise in the general price level of thirty cents in less than six months. (Shafer, p. 2750-276) (Stip. 1169)

ULTIMATE FACTS REGARDING NFO'S UNFAIR TRADE PRACTICES

196 to 201. [Mid-Am's proposed findings of ultimate facts as proposed in paragraphs 196 to 201 are expressly denied by NFO. Those paragraphs state:

> 196. NFO conspired with other corporations, persons and entities to eliminate Mid-Am.
>
> 197. NFO induced and intimidated other corporations, persons and entities to join in its plot to destroy Mid-Am.
>
> 198. NFO employees and employers of Food Consultants, Inc. (Pete Taves) and representatives of Midwest Creamery called on dairy farmer members of Mid-Am and persuaded them to change and ship their milk with NFO.
>
> 199. Non-NFO members conspired with NFO to participate in the 1967 NFO holding action which was an attempt by NFO to force predecessors of Mid-Am to relinquish their bargaining rights to NFO.
>
> 200. Between 1962 and 1966, numerous meetings between NFO employees and members were held with cooperatives (predecessors of Mid-Am), the purpose of which were to force those cooperatives into signing NFO Master Contracts. The Master Contracts had as their sole purpose and function eliminating cooperatives from bargaining for their members' milk and inserting NFO as the collective bargaining agent for the producers, with their cooperative. (Tr. 390-395)
>
> 201. In 1967 NFO instigated the Milk Holding Action, the purpose of which was to get cooperatives to sign NFO Master Contracts. (Tr. 87-88)

Mid-Am did not initially cite or rely upon any portion of the stipulated facts to support any of the findings proposed in

paragraphs 196 to 201. We have read and considered all other data elsewhere cited and relied upon by Mid-Am in support of those proposed findings. We find and conclude that the other data cited is insufficient to support Mid-Am's proposed findings and therefore refuse to make the findings as proposed.]

202. In 1968 and 1969 NFO signed numerous NFO Supply Contracts with manufacturing plants. (Stip. 927, 934, 937, 942, 953, 959, 964, 969, 971 and 977)

203. [Mid-Am's proposed finding of ultimate fact No. 203 was expressly denied by NFO. It stated:

> 203. The purpose of the Supply Contracts was to force plants to allow NFO to be the bargaining agent. The NFO Supply Contracts resulted in producers switching their milk from the plants to which they had previously shipped to plants signing the NFO Milk Supply Contracts. (Stip. 911 [471], 1080 [566], 1095-1095a [574-575]

In accordance with the procedure and practice above established, in lieu of the findings proposed by Mid-Am in rejected paragraph 203, we make additional findings in the language of the paragraphs of the stipulation cited and relied upon by Mid-Am in support of the findings proposed in that paragraph. It is to be noted that we have added the stamped paragraph numbers in brackets after Mid-Am's citation to the typewritten paragraph numbers in order to avoid apparent confusion:]

203-911 [471]. The signing of the Phase II NFO Milk Supply Contracts in early 1969 caused some movement of milk to contracting plants from producers who previously shipped to other processors. (Scott, p. 921-922)

203-1080 [566]. NFO personnel believed that the implementation of the Phase II Supply Contracts in Minnesota and Wisconsin would cause a general rise in the prices paid to producers by contracting processors and that such a price rise would attract additional supplies of milk to the contracting processor.

203-1095 [574]. In negotiating Phase II Milk Supply Contracts, it was intended that NFO members would supply the contracting processor with milk as provided by the Contract.

203-1095a [575]. In those instances where NFO was successful in negotiating a Phase II Milk Supply Contract with a processor, other processors located nearby who had not signed an NFO Phase II Supply Contract might lose the milk of NFO members previously being shipped to them to the contracting processor.

204. In mid-1969, Mid-Am refused to sign an NFO Supply Contract. (Stip. 1151, 1155) [Ct. Exh. #1, ¶¶ 601, 612]

205. [Mid-Am's proposed finding of ultimate fact No. 205 was expressly denied by NFO. It stated:

> 205. In order to force Mid-Am to sign the NFO Milk Supply Contracts, NFO decided to move into the marketing of milk. NFO's marketing activities are *not* an end in themselves, but rather the means by which NFO accomplished its purposes. (Stip. 98)

In accordance with the procedure and practice above established, in lieu of the findings proposed by Mid-Am in rejected paragraph 205, we make additional findings in the language of the paragraph of the stipulation cited and relied upon by Mid-Am in support of the finding proposed in that paragraph:]

205-98. [See finding 9, *supra.*]

206. NFO's purpose and principal activity is collective bargaining. (Stip. 91, 92) [Ct. Exh. #1], ¶ 47]

207. [Mid-Am's proposed finding of ultimate fact No. 207 was expressly denied by NFO. It stated:

> 207. NFO's move into "marketing" was *not* done for the purpose of becoming a marketing competitor of Mid-Am, but solely to force Mid-Am to sign an NFO Supply Contract, the sole and only purpose of which was to *eliminate* Mid-Am from the marketing of *representing producers.*

Mid-Am did not initially cite or rely upon any portion of the stipulated facts to support the findings proposed in paragraph 207. We have read and considered all data cited by Mid-Am in Appendix A to Mid-Am's reply brief in support of that proposed finding. We find and conclude that the data to which reference was made are insufficient to support Mid-Am's proposed finding and therefore refuse to make the finding as proposed.]

208. [Mid-Am's proposed finding of ultimate fact No. 208 was expressly denied by NFO. It stated:

> 208. As part of its "marketing" program, NFO engaged in a program of solicitation of Mid-Am's producer members, inducing them to breach their marketing contracts with Mid-Am, in violation of Section 1, Sherman Act, and state law of various states. (Stip. 1243 [669]; 1244 [670]; 1286 [703]; 1275 [694]; 1275(a) [695]; 1361(a) [741]; 1293 [706]; 1296 [709]; 1300 [711]; 1301 [712]; 1302 [713]; 1303 [1714]; 1304 [715]; 1308 [719]; 1310 [720]; 1312 [722]; 1314[724]; 1315 [725]; 1316 [726]; 1318 [728]; 1319 [729]; 1576 [814]; 1577 [815]; 1578 [816]; 1579 [817]; 1583 [818]; 2685 [1248]; 2693 [1253]; 2714 [1267]; 2715 [1268]; 2716 [1269]; 2717 [1270]; 2718 [1271]; 2719 [1272]; 2633 [1221]; 2635 [1222]; 2637 [1223]; 2639 [1224]; 2641 [1225]; 2643[1226]; and many more).

In accordance with the procedure and practice above established, we reject the finding proposed by Mid-Am in paragraph 208, and in lieu thereof, we make additional findings in the language of the paragraphs of the stipulation cited and relied upon by Mid-Am in support of the finding proposed. The stamped paragraph numbers have been added in the same pattern as paragraph 203, above:]

208-1243 [669]. In the fall of 1969, in Missouri, T. Forbes contacted dairy farmers who were shipping their Grade A milk through Mid-America concerning the proposed NFO marketing program.

208-1244 [670]. In September, 1969, all of the NFO members producing Grade A milk in Wright County, Missouri, that T. Forbes knew were shipping their milk through Mid-Am.

208-1286 [703]. Between the fall of 1969 and March of 1970, T. Forbes called on some NFO producers and attempted to persuade them to market their milk with NFO.

208-1275 [694]. In late 1969 or early 1970 when Hills was contacting dairy farmers who were NFO members, Hills was aware that all Grade A dairy farmers in the Mountain Grove area were shipping their milk through Mid-Am.

208-1275(a) [695]. In late 1969 or early 1970, Herman Hills believed that most Grade A dairy farmers shipping their milk through Mid-Am had membership agreements with Mid-Am.

208-1361(a) [741]. From July, 1969 until July, 1970, on behalf of the NFO Dairy Department, Welch estimated that approximately 25 NFO members who were milk producers in Central Missouri had milk available, some of whom were probably shipping through Mid-Am.

208-1293 [706]. Some time between July, 1970 and December, 1971, T. Forbes talked with some milk producers who were shipping milk through Mid-Am.

208-1296 [709]. Some of the producers T. Forbes called on as a field man for NFO were not NFO members and were shipping their milk through Mid-Am.

208-1300 [711]. On August 31, 1970, T. Forbes, as a field man for NFO, called on five milk producers who were shipping their milk through Mid-Am on that date, the purpose being to acquire more milk to be shipped in the NFO Dairy Program.

208-1301 [712]. On August 31, 1970, Leonard Grimes, who on that date was shipping with Mid-Am told T. Forbes he would be willing to ship with NFO.

208-1302 [713]. On August 24, 1970, T. Forbes called on two producers shipping through Mid-Am, the purpose being to acquire more milk to be shipped in the NFO Dairy Program.

208-1303 [714]. On August 27, 1970, T. Forbes called on Ray Hobbs, a Grade A milk producer shipping with Mid-Am,

the purpose being to acquire more milk to be shipped in the NFO Dairy Program.

208-1304 [715]. On August 28, 1970 Forbes called on Messrs. Sparlin, Clouse, Dudley, Houseley and Turner, all milk producers who were marketing through Mid-Am on that date, to tell them what the NFO milk marketing program had to offer, in the way of price. (Forbes, p. 188-189)

208-1308 [719]. On September 8, 1970 T. Forbes called on Leonard Grimes, who on that date was shipping his milk with Mid-Am.

208-1310 [720]. On September 8, 1970, T. Forbes called on George Duerney, who on that date was shipping his milk with Mid-Am.

208-1312 [722]. On September 8, 1970, T. Forbes called on Lefal Brown, who on that date was shipping his milk with Mid-Am.

208-1314 [724]. On September 8, 1970, T. Forbes called on Ronald Hanby, and asked him to ship milk with NFO.

208-1315 [725]. On September 8, 1970, Hanby was shipping his milk with Mid-Am.

208-1316 [726]. The week of September 14 through 18, 1970, T. Forbes called on Messrs. Short, Freeman, Cantrell and Nichols, all of whom were shipping milk with Mid-Am at that time.

208-1318 [728]. The week of September 14 through 18, 1970, T. Forbes called on Robert Cager, who on that date was shipping his milk through Mid-Am.

208-1319 [729]. The week of September 21 through 26, 1970, T. Forbes called on Freeman, Adams, Lawrence, and Riley, who were all at that time shipping their milk through Mid-Am.

208-1576 [814]. During the week of March 21, 1970, Bruemmer called on Ed and Anton Kempher about shipping their milk through NFO Dairy Program.

208-1577 [815]. During the week of May 9, 1970, Bruemmer contacted milk producers Ed Kempher, Anton Kempher, Lawrence Wiebers, Stanley Bernskoetter and Clarence Wiebers. (Bruemmer, p. 403)

208-1578 [816]. During the week of May 9, 1970, Bruemmer visited farmers Lawrence Scheullen, Jerome Leubbring, Frank Swartzer and Lo-Mo Guernsey Farm.

208-1579 [817]. During the week ending May 30, 1970, Bruemmer visited farmers Victor Bruemmer, Leonard Kempher, Lawrence and Leo Leubbring, Jerome Leubbring, Fred Swartzer, Pat Hirtges and Wisted.

208-1583 [818]. During the week ending June 6, 1970, Bruemmer contacted Ed Kempher, Lawrence Wilbur and Stanley Bernskoetter about the start of shipping milk the following week in the NFO program. (Bruemmer, p. 416)

208-2685 [1248]. During the week of March 21, 1970, Bruemmer took Texas Health Inspectors around to inspect Jerry Voss for the health certificates required for shipping milk to Texas. (Bruemmer, p. 374)

208-2693 [1253]. During the week of March 21, 1970, Breummer took Texas health inspectors around to inspect William Schullen for shipment of milk to Texas through the NFO. (Breummer, p. 374.)

208-2714 [1267]. During the week of March 14, 1970, Breummer got a commitment from Anton Kempher to move milk to Texas through the NFO. (Breummer, p. 370-371)

208-2715 [1268]. During the week of March 21, 1970, Breummer contacted Ed and Anton Kempher about moving their milk to NFO. (Breummer, p. 376)

208-2716 [1269]. During the week of May 9, 1970, Breummer contacted Ed and Anton Kempher. (Breummer, p. 403)

208-2717 [1270]. During the week ending June 20, 1970, Breummer contacted Ed Kempher about moving milk. (Breummer, p. 414-415)

208-2718 [1271]. During the week ending June 6, 1970, Breummer contacted Ed Kempher about the start, the following week, of milk shipments through the NFO. (Breummer, p. 416)

208-2719 [1272]. Breummer met with Ed and Anton Kempher during the week ending June 27, 1970 about moving milk in the NFO program. (Breummer, p. 418)

208-2633 [1221]. On January 21, 1970, Hills talked to John Watterson, Mansfield, Missouri, Wright County. (Hills, Exh. 42)

208-2635 [1222]. On January 23, 1970, Hills talked to John Lee Ellis, Hartville, Missouri, Wright County. (Hills, Exh. 44)

208-2637 [1223]. On January 22, 1970, Hills talked to Billy Clouse, Mansfield, Missouri, Wright County. (Hills, Exh. 43)

208-2639 [1224]. On January 21, 1970, Hills talked to Ray McCrite, Mansfield, Missouri, Wright County. (Hills, Exh. 42)

208-2641 [1225]. On January 22, 1970, Hills talked to Ted Forbes, Mansfield, Missouri, Wright County. (Hills, Exh. 43)

208-2643 [1226]. On January 24, 1970, Hills talked to Dean Ellis, Hartville, Missouri, Wright County. (Hills, Exh. 45)

[209. Mid-Am's proposed finding of ultimate fact No. 209 was expressly denied by NFO. It stated:

> 209. NFO engaged in price-cutting activities in selected Mid-Am markets. (Tr. 932-936; 1011-1022; 1050-1055)

NFO implicitly conceded that the evidence shows that NFO cut prices in the St. Louis-Ozarks market. We accordingly find, without, however, finding or concluding that such action was illegal under the circumstances, that:]

209. NFO engaged in price-cutting activities in the St. Louis-Ozarks market.

210. NFO, in order to obtain qualification as a recognized cooperative by USDA, submitted an application to the Dairy

Division in March, 1970. (Stip. 1708, 1713, 1713(a) [Ct. Exh. #1, ¶¶ 859, 863, 864]

211. [Mid-Am's proposed finding of ultimate fact No. 211 was expressly denied by NFO. It stated:

> 211. NFO submitted a substantial amount of false and misleading evidence in order to obtain the qualification from the USDA. (Stip. 1742-1743 [880-881], 1752 [886], 1755 [888], 1757 [889]

In accordance with the procedure and practice described above, including the paragraph numbering problem, we make the findings agreed to in the stipulation in lieu of Mid-Am's proposed finding of ultimate fact No. 211:]

211-1742 [880]. The Milk Sales Agreements which had been signed by NFO members prior to the time of NFO's 1970 Application for Qualification did not contain a provision giving "NFO full power and authority in its own name to collect the entire amount due for milk delivered."

211-1743 [881]. NFO has never collected in its own name and commingled with its own funds amounts due from the sale of its members' milk.

211-1752 [886]. At the time of the initial filing of NFO's March, 1970 Application for Qualification of Cooperative Milk Marketing Association with the United States Department of Agriculture, NFO cited and submitted only NFO form 7-3-39AR in response to question C-1 as the document giving NFO the "full authority in the sale of its members' milk."

211-1755 [888]. Section 7 C.F.R. § 900.353 provides, among other things, that: "The association must: . . . (c) have full authority in the sale of its members' milk."

211-1757 [889]. The U.S.D.A. Dairy Division Application for Qualification Form DA-25 in Section C, question 1, requests the applicant association to identify the document or documents which give the association full authority in the sale of its members' milk.

212. NFO never reported to the IRS that NFO had begun to engage in marketing milk in 1970. (Stip. 1663, 1838-1841)[9] [Ct. Exh. #1, ¶¶ 838, 936-939]

213. Graf, hed of the NFO Dairy Department, welcomed accusations of destroying Mid-Am because it showed NFO was achieving its goal. (Ex. 31)

214. Mid-Am Board President Bill Powell testified at the 1970 confrontation between representatives of NFO and Mid-Am in John Gage's office that Gordon Shafer of NFO stated clearly and unequivocally NFO's intent was to destroy Mid-Am. (Tr. 740, 741)

215. As far back as 1963, NFO was trying to get Mid-Am predecessor TCMPA to sign an NFO Master Contract.

216. [Mid-Am's proposed finding of ultimate fact No. 216 was expressly denied by NFO. It stated:

> 216. Another threat of destruction of a Mid-Am predecessor was made in 1964, when Mid-Am [sic] representatives evidenced a clear intent to destroy Square Deal. (Tr. 284, 285, 299-300, 362-366

We reject the finding proposed by Mid-Am because it assumes that there was a "threat of destruction" and "a clear intent to destroy Square Deal in 1964." The evidence, in our judgment, does not support such a finding.]

ROBINSON-PATMAN FACTUAL FINDINGS

217. [See finding 91, *supra*.]

218. [Mid-Am's proposed finding of ultimate fact No. 218 was expressly denied by NFO. It stated:

218. NFO Milk Supply Contract provisions were stipulated between the parties and they included a provision requiring the purchaser to pay NFO dairy farmers the same price for

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[9] NFO's admission is qualified by its statement that NFO denies that it "was *marketing* within the meaning of Form 990."

milk as other dairy farmer sellers delivering to the contracting plant, plus an additional sum characterized as being "for services rendered." (Stip. 451, 454, 455, 927

In accordance with the procedure and practice above established, in lieu of the findings proposed by Mid-Am in rejected paragraph 218, we make additional findings in the language of the paragraphs of the stipulation cited and relied upon by Mid-Am in support of the findings proposed in those paragraphs:]

218-451. [See finding 91, *supra*.]

218-454. In some instances the Phase II Milk Supply Contracts were negotiated by Marketing Area Dairy Bargaining Committees comprised of NFO members themselves producers and in negotiating the sum of money to represent payment for "services rendered" the Committee would negotiate for as large a sum as they could reasonably expect to receive for the services intended to be performed. (Ochsner, p. 783)

218-455. In some instances members of the NFO Dairy Department staff together with NFO dairy farmers or NFO Area Dairy Bargaining Committees attempted to negotiate Milk Supply Contracts and in such negotiations attempted to obtain as large a sum of money for "services rendered" as they could reasonably expect to get for the services intended to be performed.

218-927. In making the determination of qualification of NFO, the Dairy Division found that the NFO as an organization was selling milk to handlers rather than the individual producers who were marketing milk through the NFO.

219. Payments were made to NFO producers pursuant to the terms of some of the NFO Milk Supply Contracts. (Stip. 461, 567, 579)

220. The sum charged "for services rendered" was not a cost justified sum. (Tr. 105; Stip. 456, 457, 458)

221. The amount charged "for services rendered" was negotiated in each instance between NFO and the contracting buyer. (Tr. 105; Stip. 473)

222. The additional amount "for services rendered" went to the individual dairy farmer supplying milk under the NFO contract rather than to NFO. (Tr. 108; Stip. 468)

ULTIMATE FACTS
NFO VIOLATION OF MISSOURI LAW

223. Mid-Am had valid milk marketing agreements with its members. (P. Ex. 200)

224 through 226. [Mid-Am's proposed findings of ultimate fact No. 224 through 226 were expressly denied by NFO. Those paragraphs stated:

> 224. NFO solicited members of Mid-Am to breach their milk marketing agreements with Mid-Am. (P. Ex. 104, 107; Tr. 729-730, 691-694; 700-705)
>
> 225. NFO solicited members of Mid-Am to withhold their milk from Mid-Am in violation of their milk marketing agreements with Mid-Am. (Tr. 694, 704-705, 717, 730)
>
> 226. NFO solicited members of Mid-Am to market their milk through NFO instead of Mid-Am in violation of their milk marketing agreements with Mid-Am. (Tr. 694, 704-705, 717, 730)

Mid-Am initially cited and relied only on deposition and trial testimony to support the findings proposed in its paragraphs 224 to 226. In Appendix A to its reply brief, however, Mid-Am cited and relied upon various pages of its post-trial brief which, in turn, cited and relied upon various paragraphs of the stipulation.

On pages 62-63 of its post-trial brief, for example, Mid-Am argued that "NFO solicited numerous Mid-Am dairy farmers in Missouri to breach their Mid-Am contracts, in absolute, clear violation of Missouri law (Mo. Rev. Stat. § 274.260)." To support that argument, Mid-Am cited exactly the same paragraphs of the stipulation which we found as additional facts in

connection with Mid-Am's rejected paragraph 208 above. We find and conclude that the cited testimony and the cited paragraphs of the stipulation, all of which we have carefully considered, do not support the findings of ultimate fact proposed in Mid-Am's paragraphs 224, 225, and 226. We therefore reject those findings as proposed.]

227. NFO engaged in solicitation of members of Mid-Am in part through the use of form letters prepared by NFO, distributed by NFO, collected by NFO, and mailed en masse by NFO, which implicitly recognized the existence of milk marketing agreements with Mid-Am. (Stip. 760-788, 1290-1306)

228. NFO engaged in solicitation of members of Mid-Am in part by conducting mass meetings throughout the State of Missouri, at which any and all dairy farmers in attendance, most of whom had milk marketing agreements with Mid-Am, were urged to cease doing business with Mid-Am and to instead market their milk through NFO. (Stip. 657, 658, 659, 679, 691, 698)

229. NFO engaged in solicitation of members of Mid-Am in part through individual meetings with dairy farmers, most of whom had milk marketing agreements with Mid-Am, at which the farmer was urged to cease doing business with any marketing organization, including Mid-Am, and to begin marketing milk through NFO. (Stip. 694, 695, 698, 669, 811-818)

230. NFO knew that many of the dairy farmers solicited by NFO members and employees to market their milk through NFO had milk marketing agreements with Mid-Am. (Stip. 698, P. Ex. 104, 107)

231. [Mid-Am's proposed finding of ultimate fact No. 231 was expressly denied by NFO. It stated:

> 231. NFO induced the following Missouri dairy farmers to break their marketing contracts with Mid-Am:
>
> John Watterson, Billy Clouse, Ray McCrite, Johnnie Lee Ellis, Ray Watterson, Jim Watterson, Ted Forbes, Cogdill Fairy Farm, Russell Hamby, Victor Wells, H. H.

Dold, Charley Clinton, Mason Johnson, J. E. Ragain, Edna and Stafford Bennet, Fay and John Ellis, Charles Allen, Kenneth Schrader, Dude Degase, Joe Tabor, Raymond Homer, Jim Frye, Clarence Goldsberry, Bill Buhler, T. L. Jordan, Carl Ray, Bryan Prock, Audie Evans, Oscar and Elsa Denny, Noland Turner, R. J. and Helen Clary, Wallace G. Thornhill, Walter Stephenson, Harold Welch, George Durney, L. M. Chapman, Earl Shaddy, Allen Mallonee, Richard McLaughlin, H. A. Crumpley, Harley Blansit, Faye Hyder, Paul and Nina Burnett, John E. Atkinson, Virgil Thompson, Robert N. Leeper, L. V. Cobb, Irwin H. Baker, Bob L. Aleshire, K. L. Duckworth, J. E. Whitner & Son, Dale and John Short, Frank Tompkins, Morris Harker, E. E. McCowan, Carol Ann Freeman, Larry Dennis, Dean Ellis, Lewis Comstock, Reid Heathman, Charles Heathman, Keith Heathman, Lowell Skinner, Hershel Coats, Donald Wayne Allen, Lloyd and Larry Skelley, Gary and Dane Lewis, and Homer Bates.

We reject Mid-Am's proposed finding of ultimate fact as proposed in paragraph 231. Additional findings of fact as to the subject matter of paragraph 231 will be made in connection with our discussion of the reasons why we reject Mid-Am's proposed conclusions of law in regard to NFO's alleged violation of State law.]

232. Mid-Am was incorporated under the Kansas Cooperative Marketing Act on July 1, 1968 and qualified to do business in the State of Missouri. (Stip. 1, 3, P. Ex. 211)

ULTIMATE FACTUAL FINDINGS IN SUPPORT OF THE PLAINTIFF'S DAMAGES

233. Mid-Am is an agricultural marketing cooperative incorporated under the laws of the State of Kansas and therefore has the capacity to sue in its own name.

234 through 239. [Mid-Am's proposed findings of ultimate fact Nos. 234 through 239 were expressly denied by NFO. They stated:

234. Mid-Am was damaged in its property as a result of NFO's interference with the valid milk marketing agreements of Mid-Am's members.

235. Mid-Am was damaged in its business or property as a result of the diversion of milk of Mid-Am members to NFO.

236. Mid-Am was damaged in its business or property as a result of its failure to receive the 4 cents per hundredweight "capital retain" fee and the 6 cents per hundredweight administrative fee due to Mid-Am under the valid milk marketing agreements of Mid-Am's members.

237. The amount of damages caused to Mid-Am as a result of lost capital retain and administration fees is not less than $252,786.00

238. Mid-Am was damaged in its business or property as a result of having to meet NFO's prices in NFO's sales of milk illegally obtained from Mid-Am's members.

239. The amount of damages caused to Mid-Am from profits lost as a result of having to meet NFO's predatory prices is in excess of $1,736,564.00

We reject the findings proposed by Mid-Am in paragraphs 234 through 239 for the reason that we have found and concluded that Mid-Am failed to adduce sufficient evidence to carry the burden of proof on the issues of liability presented in Phase I of this case. Had we been required to reach the question of damage we would have found and concluded that Mid-Am's damage evidence was insufficient to suppot the findings proposed in paragraphs 234 through 239 of its proposed findings of ultimate fact.]

Phase I CONCLUSIONS OF LAW

Discussion Of Mid-Am's Proposed Conclusions Of Law In Regard To NFO's Alleged Illegal Boycott

Mid-Am set forth 35 separate conclusions of law on pages 25 to 30 of plaintiff's proposed findings of ultimate facts and proposed conclusions of law, which it proposed in connection with the issues of alleged illegal boycott. Mid-Am's separate proposed conclusions were not numbered. We shall therefore make reference to the various conclusions proposed by Mid-Am by referring to the first conclusion proposed in the first

paragraph on page 25 as "25-1;" the conclusion proposed in the second paragraph on page 25 as "25-2;" etc.

The first conclusion proposed by Mid-Am stated:

> 25-1. Evidence of other acts of a kindred character of a party may establish the party's intent or motive in the particular act directly in question.

That abstract principle of law was, as Mid-Am's post-trial brief suggests, recognized by the Eighth Circuit in *Kansas City Star* v. *United States*, 240 F 2d 643 (8 Cir. 1957). Mid-Am's second proposed conclusion, based upon language from Judge Wyzanski's opinion in *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 180 F. Supp. 125 (D.C. Mass. 1959), stated:

> 25-2. In a situation where it is inevitable that only one competitor can survive, the evidence which shows the use, or contemplated use, of unfair means is the very same evidence which shows the existence of an exclusionary intent.

Both of the first two conclusions of law proposed by Mid-Am accurately state abstract principles of law. But the conclusion proposed in 25-1 assumes that Mid-Am has carried the burden of proving some sort of "acts of a kindred character" by NFO against persons other than Mid-Am which should be considered in support of Mid-Am's claim that NFO acted with illegal intent or motive against Mid-Am. And the conclusion proposed in 25-2 assumes that Mid-Am has carried the burden of proving that "only one competitor can survive" in the various competitive situations involved in this case.

We shall not state either of the two abstract conclusions of law proposed by Mid-Am in 25-1 and 25-2 because we do not believe that either principle of law has any application to the factual circumstances established by the evidence adduced in Phase I of this case.

Mid-Am, in a somewhat similar manner, proposed two abstract conclusions relating to boycotts and one in regard to

price-fixing. Those three abstract conclusions proposed by Mid-Am state:

> 25-4. Group boycotts or joint refusals to deal are illegal *per se* under Section 1 of the Sherman Act.
>
> 29-27. Concerted group boycotts which have as their purpose forcing a party to accede to desired trade practices are illegal *per se* under Section 1 of the Sherman Act.
>
> 27-17. Price-fixing is *per se* illegal under Section 1 of the Sherman Act, whether the agreement has been put into effect or not.

NFO does not dispute the general proposition that boycotts and price-fixing, if proven, violate Section 1 of the Sherman Act. The real dispute between the parties is a factual dispute and presents the question of whether Mid-Am carried the burden of proving factual circumstances in regard to which the abstract principles of law accurately stated in Mid-Am's proposed conclusions, 25-4, 29-27, and 27-17 should be applied. The remainder of Mid-Am's 35 proposed allegedly illegal boycott conclusions are based upon similar factual assumptions which reflect what Mid-Am believes it established by the greater weight of the credible evidence. The same sort of question is presented in regard to whether Mid-Am carried the burden of proving the facts assumed in regard to those proposed conclusions of law.

The first section of Mid-Am's post-trail brief is devoted to what is essentially a factual argument in regard to how Mid-Am would have the Court consider "NFO's entire course of conduct." Mid-Am commenced that argument with the assertion that "[t]he primary goal of NFO, the purpose for which it was organized, was to establish a monopoly in bargaining for the sale of agricultural products for farmers" and that "NFO recognized at the outset that this meant the control or replacement of any effective dairy competition." Mid-Am would have this Court find and conclude that NFO actually knew what it was doing when it somewhat belatedly became interested in dairy farmers and in the marketing of milk.

Mid-Am's basic factual argument is that "the evidence viewed as a whole clearly establishes the one concept of NFO and the unified course of conduct" of NFO was designed to "eliminate the cooperatives from being the collective bargaining agent for their own members" and that such action would, in turn, cause the cooperatives to "be eliminated from bargaining and be replaced by NFO." Mid-Am's general and quite basic factual theory is contained in Mid-Am's proposed conclusion 25-3 which states that:

> 25-3. NFO leaders intended that only NFO would survive as the bargaining agent for dairy farmers and that this meant elimination of dairy cooperatives from bargaining as a direct result if NFO succeeded in signing and activating its Master Contracts.

In its post-trial brief, Mid-Am summarized its "course of conduct" argument by stating that "from the very early '60's NFO's *entire course* of conduct in dairy has been directed at *one goal* . . . the elimination of *all* cooperatives" and that such alleged conduct was consistent with the purpose stated in NFO's By-Laws, namely, "*To unite into one organization*, regardless of religion, race, creed, color or nationality, *all farmers* engaged in the production of agricultural commodities." [Mid-Am's emphasis]

The By-Law relied upon by Mid-Am is contained in paragraph 158 of the stipulation of facts. That stipulation, however, contains many other paragraphs which establish that NFO's course of conduct in regard to the dairy cooperatives was not at all directed toward their elimination. For example, paragraph 152 of the stipulation states that "In the early 1960's, the concept of a marketing agency in common was designed by NFO for the marketing of milk and dairy products, because dairy producers were organized in co-ops to a significant degree." It was further stipulated in paragraph 157 that "In the early and mid-1960's NFO sought the formation by the existing dairy cooperatives of a marketing agency in common that would be effective in marketing and pricing their products." Paragraph 177 of the stipulation stated that "[I] n the early

1960's NFO proposed that the *existing* milk cooperatives get together and form a marketing agency in common" (emphasis ours).

NFO's purpose in proposing that the *existing* cooperatives get together was made clear by paragraphs 179 and 180 of the stipulation. The parties agreed in paragraph 179 that "[i] n the early 1960's the marketing agency in common concept suggested by NFO was that the co-ops would establish one organization so that the milk of the organization's member co-ops could be marketed through one organization to gain bargaining strength." Paragraph 180 of the stipulation provided "[I] n the early 1960's NFO recommended the marketing agency in common because dairy farmers had organized so many bargaining groups that they were dividing, rather than uniting, their bargaining power."[10]

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[10] See also paragraphs 212 to 215 of the stipulation of facts. Those paragraphs provide:

> 212. During the period 1962 through 1967, NFO personnel encouraged NFO members, who were also members of dairy cooperatives, to be active in the affairs of their cooperatives including running for elective office in the cooperative.
>
> 213. During the period 1962 through 1967, some NFO personnel encouraged NFO members in seeking election to dairy cooperative boards to encourage those boards to sign Master Contracts with NFO.
>
> 214. During the period 1962 through 1967, some NFO personnel encouraged NFO members to support candidates for election to the Board of Directors of dairy cooperatives who were also NFO members.
>
> 215. During the period 1962 through 1967, the concept of having NFO members elected to dairy co-op Boards of Directors for the purpose of encouraging those cooperatives to sign Master Contracts was a matter discussed by NFO Dairy Department personnel.

Those additional stipulated factual circumstances are inconsistent with the notion that NFO's single goal was to eliminate all existing cooperatives.

The parties further stipulated that "none of the large cooperatives undertook to form or to join a marketing agency in common" (paragraph 187 of the stipulation) as NFO had proposed. The basic underlying factual circumstances concerning NFO's quite unsuccessful efforts to persuade existing dairy cooperatives to sign NFO Master Contracts; NFO's abandonment of that effort; NFO's sponsorship of the 1967 Milk Holding Action; NFO's 1968 attempt to develop an effective Supply Contract program; and, finally, NFO's establishment and operation of its "reload stations," are not in factual dispute. Mid-Am would have this Court view the quite chaotic history of NFO's various and separate efforts "to raise the price of milk paid to dairy farmers and to strengthen NFO's bargaining position," as the parties stipulated was one of the purposes of the 1967 Holding Action (see paragraph 405 of the stipulation), as "different expedients" to accomplish NFO's alleged primary goal of elimination of all existing dairy cooperatives. Mid-Am argues that "although different expedients were adopted from time to time when it was found one particular expedient would not accomplish the overall purpose, . . . NFO engaged in a single course of conduct to accomplish this one purpose . . . to impair, control or eliminate effective competition."

We quite agree that the record establishes that NFO adopted what Mid-Am would call "different expedients" in its uncharted adventure into the field of marketing the milk of its members. And we agree that the record shows that the various "expedients" may not have accomplished the purpose NFO had in mind when a particular "expedient" was adopted. But we do not believe that it can fairly be said that there is any real factual dispute about the purposes of the various "expedients."

We have already made reference to paragraph 405 of the stipulation in which it was agreed that one of the purposes of the 1967 Holding Action was "to raise the price of milk to dairy farmers . . . which would help NFO to write contracts which assure better milk prices for farmers in the future." In a quite similar manner, the parties stipulated in paragraph 204 of the stipulation that "through 1967, NFO believed that its Master

Contracts were tools through which dairy farmers could obtain the cost of production plus a reasonable profit for their milk."

NFO's stipulated expectation that the 1967 Holding Action would actually raise the price of milk was never realized. Nor was its stipulated belief that its Master Contract program would actually enable dairy farmers to obtain "the cost of production plus a reasonable profit" ever confirmed. But those facts do not support Mid-Am's proposed finding that both those separate efforts—or "expedients," to use Mid-Am's language—were but parts of a "single course" of NFO conduct, all of which was directed to an alleged "primary goal" to eliminate all existing dairy cooperatives.

Indeed, the record would come closer to supporting a set of findings that NFO became a victim of its own propaganda and that its ignorance and inexperience in the dairy field required it to experiment with one unsound idea after another in its effort to keep and save face with those of its members who may have read the overly optimistic articles which were quite regularly published in the NFO Reporter.

It is, of course, not necessary to make any finding or state any conclusion other than to state our considered view that Mid-Am did not carry the burden of proving the factual assumptions upon which its proposed conclusion 25-3 is based; namely, that "NFO leaders intended that only NFO would survive" and that this meant "elimination of dairy cooperatives from bargaining as a direct result if NFO succeeded in signing and activating its Master Contracts."

We have stated our reasons for refusing to make Mid-Am's proposed conclusion 25-3 in considerable detail because what we have stated in connection with that proposed conclusion is generally applicable to the substantial number of additional conclusions of law which Mid-Am proposed in regard to the 1967 Milk Holding Action which, of course, took place before Mid-Am was even organized.

Mid-Am's proposed conclusion of law 25-6 and 25-7 stated:

> 25-6. The NFO Milk Holding Action constituted a concerted group boycott.
>
> 25-7. The activities of NFO, its members and employees in persuading, forcing, or coercing dairy farmers to boycott predecessors of Mid-Am during the 1967 Milk Holding Action constituted a concerted group boycott.[11]

Mid-Am presented three conclusions of law, 26-12, 25-5, and 26-15, which are based on the factual assumption that NFO designed the 1967 Milk Holding Action to force then existing cooperatives to sign NFO Master Contracts in order "to eliminate predecessors of Mid-Am from the market of representing their members." Mid-Am's proposed conclusion 26-12 stated:

> 26-12. The activities of NFO, its members and employees in attempting to induce predecessors of Mid-Am to sign NFO Master Contracts during the 1967 Milk Holding Action constituted a concerted group boycott to eliminate predecessors of Mid-Am from the market of representing their members.[12]

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[11] Mid-Am's proposed conclusions of law 25-8 and 26-9 were submitted in exactly the same language, which stated: "25-8 and 26-9. The activities of NFO, its members and employees in inducing dairy farmers to withhold their milk from predecessors of Mid-Am during the 1967 Milk Holding Action constituted a concerted group boycott."

Our discussion of Mid-Am's conclusions of law 25-6 and 25-7 is applicable to Mid-Am's 25-8 and 26-9.

[12] Mid-Am's proposed conclusions of law 25-5 and 26-15 repetitiously state that:

> 25-5. The activities of NFO, its members, and employees in attempting to induce predecessors of Mid-Am to sign NFO Master Contracts by the 1967 Milk Holding Action constituted a concerted group boycott designed to force, persuade, or coerce predecessors of Mid-Am to accede to trade practices desired by NFO, that is, to sign an NFO Master Contract.
>
> 26-15. The means used by NFO to induce or attempt to induce predecessors of Mid-Am to sign NFO Master Contracts

Mid-Am proposed three additional conclusions of law in connection with the 1967 NFO Milk Holding Action, Mid-Am's 28-19 stated:

> 28-19. NFO, with its members and employees, in the 1967 NFO Milk Holding Action, created and participated in a concerted group boycott and group refusal to deal in persuading milk producers to fail to perform their contracts and to refuse to have normal business relations with their milk marketing cooperatives, including predecessors of Mid-America, and thereby violated Section 1 of the Sherman Act.[13]

All of the conclusions of law proposed in connection with the 1967 Milk Holding Action relate to alleged acts and conduct of NFO that took place before Mid-Am came into existence. Mid-Am contends that evidence of NFO's sponsorship of the 1967 Milk Holding Action is relevant and significant under the "acts of kindred character" principle stated in *Kansas City Star* v. *United States*, 240 F2d 643 (8 Cir. 1957).

We find and conclude that the conclusions of law proposed by Mid-Am in the 1967 Milk Holding Action group of proposed

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during the 1967 Holding Action, included withholding of milk, threats of withholding of milk, threats of withdrawal of milk from cooperatives which refused to sign, intimidation, force and coercion.

Our discussion of Mid-Am's conclusion of law 26-12 in the text is applicable to Mid-Am's 25-5 and 26-15.

[13] Mid-Am's separately proposed conclusions of law 26-10 and 26-11 duplicate Mid-Am's 28-19. What we say in the text about 28-19 is applicable to 26-10 and 26-11 which state:

> 26-10. The activities of NFO, its members and employees in persuading, forcing, or coercing dairy farmers not to perform their marketing contracts with predecessors of Mid-Am during the 1967 Milk Holding Action constituted a concerted group boycott.
>
> 26-11. The activities of NFO, its members and employees in inducing dairy farmers to refuse to have normal business relations with predecessors of Mid-Am during the 1967 Milk Holding Action constituted a concerted group boycott.

conclusions of law under discussion may not properly be made for the reason that even if it be assumed that the "kindred character" theory should be applied in this case, we are satisfied that Mid-Am failed to adduce sufficient evidence to support the factual findings which the trier of the facts must find before the various proposed 1967 Milk Holding Action conclusions of law may properly be made.

The unidentified "dairy farmers" mentioned in this group of proposed conclusions of law had the right, in the absence of an illegal agreement, to sell or to refuse to sell their milk to anyone or to no one, for good cause or for no cause whatever. The evidence does not establish that the dairy farmers who withheld their milk from the market during the relatively short period of time involved in the 1967 Milk Holding Action did so because they were either "forced" or "coerced" to do so. And certainly the evidence adduced does not support any inference that the purpose of the 1967 Milk Holding Action was "to eliminate the cooperatives." Rather, it must be said in this case, as the Eighth Circuit said of the group of defendants in *Johnson* v. *J.H. Yost Lumber Co.*, 117 F2d 53, 62 (8 Cir. 1941), who were described as the "supplier defendants," that there was no substantial evidence adduced in this case that the dairy farmers went "beyond the simple refusal to sell their goods for reasons which were sufficient to them and which appeal to one as having a substantial basis in reason."

The same thing must be said about Mid-Am's failure to adduce sufficient evidence to prove that the dairy farmers were induced or that NFO attempted to induce those dairy farmers to fail to perform their contracts or to refuse to deal with predecessors of Mid-Am. In short, we find and conclude that Mid-Am's 1967 Milk Holding Act group of proposed conclusions of law should and will not be made.

Mid-Am proposed four additional conclusions of law in regard to the NFO Master Contracts. Those four, Mid-Am's 26-13, 26-14, 27-16, and 27-18, are based on the implicit factual assumptions (1) that the NFO Master Contracts were, in fact,

price fixing agreements and (2) that cooperatives which actually signed an NFO Master Contract did so involuntarily. The four proposed conclusions of law stated:

> 26-13. The NFO Master Contracts were agreements which actually stated a fixed price to be paid to NFO Members (i.e., $6.05 per CWT for Grade A milk and $5.00 per CWT for manufacturing grade milk), and were therefore illegal price fixing agreements.
>
> 26-14. NFO induced or attempted to induce predecessors of Mid-Am to sign NFO Master Contracts.
>
> 27-16. Cooperatives that signed NFO Master Contracts did not do so voluntarily.
>
> 27-18. The fact that the NFO Master Contracts were never activated has no bearing upon whether these contracts were illegal price-fixing agreements.

We find and conclude that the NFO Master Contracts which the record shows were in fact signed by particular cooperatives were not, in fact, price fixing agreements. We further find and conclude that the evidence adduced does not support any finding of fact or legal conclusion that any cooperative did not voluntarily sign any particular NFO Master Contract.

Mid-Am proposed a large number of conclusions of law in regard to the NFO Supply Contract. The first four of those conclusions, 28-21, 28-22, 28-23, and 28-24, include and are based on factual assumptions which relate to both "Mid-Am and some of its predecessor cooperatives." Those proposed conclusions of law stated:

> 28-21. NFO attempted to induce Mid-Am and some of its predecessor cooperatives to sign an NFO Supply Contract.
>
> 28-22. The means used by NFO to induce or attempt to induce Mid-Am and some of its predecessor cooperatives to sign NFO Supply Contracts included theats of withdrawal of milk, actual withdrawal of milk and solicitation of cooperative members to breach their contracts.[14]

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[14] Mid-Am's proposed conclusions 28-23 and 28-24 incorporated and assumed factual data concerning one of Mid-Am's predecessors.

We find and conclude that the means used by NFO to induce or to attempt to induce Mid-Am and some of its predecessors (including but not limited to Fergus Dairy Cooperative) did not violate the antitrust laws of the United States.

Five of Mid-Am's proposed conclusions, 29-28 to 29-33, inclusive, relate directly to alleged NFO activities directed solely to Mid-Am.[15] Those proposed conclusions stated:

> 29-28. The activities of NFO, its members and employees in inducing dairy farmer members of Mid-Am to refuse to ship milk to Mid-Am was for the purpose of persuading or inducing Mid-Am to sign an NFO Supply Contract.
>
> 29-29. The activities of NFO, its members and employees in inducing dairy farmer members of Mid-Am to breach their milk marketing contracts with Mid-Am constituted a concerted group boycott.

Those two proposed conclusions of law stated:

> 28-23. At least one cooperatives [sic] which is now part of Mid-Am, Fergus Dairy Cooperative, signed an NFO Supply Contract.
>
> 28-24. Fergus Dairy Cooperative signed an NFO Supply Contract involuntarily, as a result of threats and actual loss of milk before signing an NFO Supply Contract.

We find and conclude that Mid-Am's evidence does not support a conclusion of law that assumes that any NFO Supply Contract that Fergus Dairy Cooperative may have signed was in fact signed involuntarily as a result of any illegal threat.

[15] One additional conclusion of law proposed by Mid-Am, 28-25, related to "action taken by NFO which affected Mid-Am." That proposed conclusion related to Mid-Am's legal position in regard to NFO's alleged exemption under the Capper-Volstead Act and stated: "28-25. Action taken by NFO which affected Mid-Am, or its predecessors, which were undertaken by NFO to force Mid-Am to sign an NFO Supply Contract are not immune from the Sherman Act."

We will discuss NFO's exemption claim in a later part of this memorandum opinion in which we state our general agreement with Mid-Am's view of the Capper-Volstead Act exemption.

29-30. The activities of NFO, its members and employees in inducing dairy farmer members of Mid-Am refrain from normal business relations with Mid-Am constituted a concerted group boycott.

29-31. The actions of NFO, its members and employees in inducing dairy farmer members of Mid-Am to boycott Mid-Am constituted a concerted group boycott.

29-32. The activities of NFO, its members and employees in attempting to induce Mid-Am to sign an NFO Supply Contract constituted a concerted group boycott, the purpose of which was to force, persuade or coerce Mid-Am to accede to trade practices desired by NFO, that is, to sign an NFO Supply Contract.

29-33. The activities of NFO, its members and employees in attempting to induce Mid-Am to sign an NFO Supply Contract constituted a concerted group boycott, the purpose of which was to eliminate Mid-Am from the market of representing its members.

The five proposed conclusions relating specifically to Mid-Am may not properly be made because the record, in our judgment, does not contain a sufficient factual basis to support the conclusions of law as proposed.

The remainder of Mid-Am's proposed conclusions of law, four in number, are reiterations of other proposed conclusions already discussed. They stated that:

30-34. The refusal of NFO and its members to deal with Mid-America and the threat and actual withdrawal by NFO and its members of milk from Mid-Am in an effort to force Mid-Am to sign an NFO Supply Contract and the combination and conspiracy by NFO with other cooperatives which signed NFO Supply Contracts, to fix the price at which milk was sold and to allocate markets and to jointly refuse to deal with Mid-Am to sign an NFO Supply Contract, violated Section 1 of the Sherman Act.[16]

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[16] Mid-Am's proposed conclusions 28-20 and 28-26 reiterate the factual untenable claim that the NFO Supply Contracts were "illegal

30-35. The actions of NFO, its members and employees in an unlawful combination with each other and with non-exempt, proprietary corporations including haulers, milk brokers, bottling plants, and manufacturing plants in persuading and attempting to persuade Mid-Am constituted a combination and conspiracy to induce a group boycott and group refusal to deal in violation of Section 1, Sherman Act (15 U.S.C. § 1).

Mid-Am's proposed conclusion 30-34 is based upon the assumption that the evidence supports a finding that a "combination and conspiracy" in fact existed between NFO "and other cooperatives which signed NFO Supply Contracts." Mid-Am's proposed conclusion 30-35 is based on the factual assumption that the undisputed factual circumstanes concerning NFO's relationship with such "outsiders," as Harold Whitmore of Whitmore Transport Company, Pete Taves, Billy Stacey, Southwest Milk Producers, and Midwest West Creamery, Inc., constituted "a group boycott and group refusal to deal in violation of Sherman 1." We find and conclude that Mid-Am failed to carry the burden of proving a sufficient factual basis for the proposed conclusions of law and therefore conclude that neither may properly be made under all the facts and circumstances of this case.

Discussion Of NFO's Proposed Conclusions of Law Regarding Its Alleged Antitrust Exemption

While NFO followed the pattern established by Mid-Am's proposed findings of ultimate facts and proposed conclusions of

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price fixing agreements." Those two proposed conclusions, both of which we reject on factual grounds, stated:

28-20. The NFO Supply Contracts were agreements which actually fixed an agreed price to be paid to NFO members, and were therefore illegal price-fixing agreements.

28-26. The fact that few NFO Supply Contracts were signed or activated or were only partially effective when activated has no bearing upon whether these contracts were illegal price fixing agreements.

law by responding directly to Mid-Am's proposed findings and conclusions in regard to "Illegal Boycott;" the alleged "Tying Arrangement;" and the other headings originally suggested by Mid-Am, NFO's first section of its proposed findings of fact and conclusions of law were submitted under a "General" heading. That heading proposed 34 findings of fact which, for the most part, were accurate paraphrases of the various paragraphs of the stipulation of facts agreed to by the parties. The first two general conclusions of law proposed by NFO under its "general" heading presented questions in regard to NFO's claim of exemption from the antitrust laws under the Capper-Volstead and Clayton Acts. Similar claims of antitrust exemption were presented by Mid-Am, CMPC, and ARSPC in Phase II of this case and were again presented by NFO in Phase III.

Application of other principles of law to the facts and circumstances of each claim involved in each of the three Phases of this litigation makes it unnecessary for this Court to reach and therefore to decide whether any of the parties would be entitled to claim an antitrust exemption under the Capper-Volstead and Clayton Acts. Because each and every party has presented their respective claims of antitrust exemption with equal vigor, we deem it appropriate to indicate our view of the rationale which we believe we would have been under duty to apply had we found it necessary to reach and decide the merits of any claim of antitrust exemption made by any of the parties in any of the three Phases of this litigation. Indeed, the various stipulations of fact and various of the responses to proposed findings of fact made in connection with the various claims of antitrust exemption in each Phase of this case establish that the factual base upon which each party predicates its respective claim of exemption is virtually undisputed. This Court's indication of its view of the legal question presented may therefore be helpful to any appellate court which might determine that the merits of the antitrust exemption question presented should be reached and decided.

In order to get the questions of law presented in appropriate focus, we note that NFO proposed as its first two conclusions of law the following:

> 1. NFO is an association of producers of agricultural commodities as defined by the Capper-Volstead Act, 7 U.S.C. §§ 291-292 and Section 6 of the Clayton Act, 15 U.S.C. § 17, and is entitled to the exemption from the antitrust laws conferred by those acts.
>
> 2. NFO did not lose its status as an association of producers under the Capper-Volstead and Clayton Acts merely by accepting dues from one religious organization and 25 individuals who allegedly were not farmers during the entire period of time covered by their dues payments, and allowing its full-time employees to remain as active members.[17]

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[17] NFO proposed four other Capper-Volstead conclusions of law in connection with various aspects of Mid-Am's claims relating to the alleged illegal boycott which read as follows:

> 5. Each contract, combination, or conspiracy that Mid-Am attributes to NFO, its members, officers, directors, and employees, including any that sets the price NFO members would be paid for their milk, is exempted from Section 1 of the Sherman Act by the Capper-Volstead Act and Section 6 of the Clayton Act.
>
> 7. In the absence of proof that a contract, combination, or conspiracy with non-farmers was involved, the efforts of one agricultural marketing organization to become exclusive bargaining agent for the members of another agicultural marketing organization do not violate Section 1 of the Sherman Act, being exempted therefrom by the Capper-Volstead Act.
>
> 12. NFO's solicitation of Mid-Am members to ship through NFO, when engaged in solely by NFO and its members and employees, is within the antitrust exemption afforded by the Capper-Volstead Act and Section 6 of the Clayton Act.
>
> 15. NFO's 1967 milk holding action, including its members' withholding of milk from the market and their recruitment of additional farmers to join NFO and participate in the holding action, was activity protected by the Capper-Volstead Act and hence exempt from Section 1 of the Sherman Act.

What we say about NFO's proposed conclusions Nos. 1 and 2 is applicable to the conclusions proposed by NFO set forth in this footnote.

The Supreme Court had not handed down *National Broiler Marketing Assn.* v. *United States*, 436 U.S. 816 (1978), at the time the parties filed their principal Phase I post-trial briefs and their respective Phase I proposed findings of fact and proposed conclusions of law. Both sides, however, recognized before *National Broiler Marketing Assn.* was decided that there was language in *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384 (1967), particularly when that case is read in light of the result reached in the earlier case of *Sunkist* v. *Winckler A. Smith Co.*, 370 U.S. 19 (1962), which suggested that questions of fact concerning the membership of an organization which claims a Capper-Volstead exemption could be of great, if not controlling, importance.

If this Court were reading and applying the principles stated in the two *Sunkist* cases on a totally clean slate, we would have, of course, paid appropriate attention and given appropriate weight to footnote 6 on page 390 of 389 U.S. of *Sunkist II*, which concluded that the majority of the Court of Appeals for the Ninth Circuit had erroneously held that any question of non-grower participation had been "resolved *sub silento* in favor of Sunkist in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrust Products Co.*, 370 U.S. 19 (1962)."[18] Had we reached the merits of the antitrust exemption question presented, however, we would not be writing on a clean slate.

We are convinced that lower federal courts would be required to recognize that both the majority and concurring opinions in *National Broiler Marketing Association, supra*, made almost talismanic application of what *Case-Swayne Co.* v. *Sunkist Growers* said about the impact that non-producer

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[18] The Ninth Circuit's conclusion in that regard was brushed aside with the statement in footnote 6 of *Sunkist II* that "non-grower participation in Sunkist was not pointed out nor was the issue raised in that [*Sunkist I*] case; indeed, it was conceded by the respondents there that Sunkist was a Capper-Volstead cooperative."

members had on an otherwise exempt organization. In express reliance upon that case, the majority opinion in *National Broiler Marketing Assn.* concluded that in order for a cooperative "to enjoy the limited exemption of the Capper-Volstead Act, and, as a consequence, to avoid liability under the antitrust laws for its collective activity, *all* its members must be qualified to act collectively." 436 U.S. at 822. [Emphasis the Court's]. The Court held that a cooperative organization that included only *one* member who was not a "farmer" as a member of the cooperation was "not entitled to the limited protection of the Capper-Volstead Act." Id. at 828-829.[19]

Until *National Broiler Marketing Assn.* was decided in 1978, we believe that NFO probably would have had the best of any argument that would have sustained NFO's Capper-Volstead exemption. Except for that most recent Supreme Court decision, we believe that NFO would have been able to successfully argue that Mid-Am's argument against exemption was "factually predicated upon mere recordkeeping formalities — the mere presence on the membership list of names of individuals who, by express by-law provision, had been stripped of all vestiges of membership" (NFO's post-trial brief, page 9).

In spite of the fact that the evidence established that NFO did little to keep an accurate list of its members and in spite of the fact that NFO apparently attempted to collect dues from persons who may have been ineligible for membership, there is no evidence in this case that any of the nonproducer members of NFO had anything to do with the establishment of NFO's general policies or with NFO's involvement in the marketing of milk. Except for *National Broiler Marketing Assn.*, we

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[19] Mr. Justice Brennan's concurring opinion stated: "I agree that since several of NBMA's members were not engaged in the production of agriculture as farmers, *Case-Swayne* v. *Sunkist Growers, Inc.*, 389 U.S. 384 (1967), compels the holding that NBMA's acivities challenged by the United States cannot be afforded the Sherman Act exemption NBMA asserts." 436 U.S. at 829.

probably would have given favorable consideration to NFO's argument that the factual circumstances presented in this case, when viewed from an economic viewpoint, are distinguishable from *Sunkist II* and that the principles stated in *Sunkist I* were applicable to this case.

We have concluded, however, and not without considerable reluctance, that we would not have been free to distinguish *National Broiler Marketing Assn.* in light of the apparent rationale of that case. We believe that *National Broiler Marketing Assn.* requires that the Capper-Volstead exemption be narrowly construed by all lower federal courts and that such narrow construction further requires that a cooperative association which wishes to claim a Capper-Volstead exemption must take appropriate action to police its membership to the end that not "even one," 436 U.S. at 828, of its members is a non-producer, *i.e.*, a person who is not engaged in the production of agricultural products.

Under the undisputed factual circumstances, NFO made no effective effort to enforce its by-law with the result that a small number of non-producers were in fact considered as members of NFO. Under the strict and narrow construction we believe is required by the most recent and controlling Supreme Court case, had we reached and decided the merits of the question presented, we would have rejected NFO's proposed Capper-Volstead Act conclusions of law.

Discussion Of NFO's Proposed Conclusions Of Law Regarding Alleged Illegal Boycott

Our discussion of Mid-Am's proposed conclusions of law forecast our agreement with a number of conclusions of law proposed by NFO. Our rejection of Mid-Am's proposed conclusions of law reflected our view that Mid-Am failed to carry the burden of proof in regard to the factual assumptions upon which Mid-Am's proposed conclusions of law were based.

Our express acceptance of a particular conclusion of law proposed by NFO will further reflect our view of the facts and

circumstances established by all the evidence and make explicit the rationale of our ruling against Mid-Am on the ultimate issues of fact and the conclusions of law which Mid-Am proposed in connection with Mid-Am's claim in regard to an illegal boycott.

On the issue of liability in regard to Mid-Am's illegal boycott claim, we therefore state the following conclusions of law, keyed to paragraph numbers proposed by NFO:

6. Mid-Am has not proven the involvement of any "nonexempt, proprietary corporations," such as "haulers, milk brokers, bottling plants, and manufacturing plants" in a combination or conspiracy with NFO to conduct or induce a boycott.

8. In the absence of proof that a contract, combination or conspiracy with non-farmers was involved, interference by one agricultural marketing association with contractual relationships between a competing agricultural marketing association and its members is no violation of Section 1 of the Sherman Act.

9. NFO's efforts to become the exclusive bargaining agent for dairy-producer members of Mid-Am did not violate Section 1 of the Sherman Act.

10. NFO's conduct in soliciting producer members of Mid-Am to market milk through NFO, NFO offers of milk sales to Mid-Am customers, and NFO sales of milk to Mid-Am customers increased competition in the procurement and sales of milk and furthered the purposes of the Sherman Act.

11. NFO's persuading and attempting to persuade Mid-Am milk producer members to market milk through NFO was not a combination or conspiracy to induce a group boycott or a group refusal to deal or predatory practice in violation of Section 1 of the Sherman Act.

13. NFO's and its members' threats to withhold, and actual withholding, if any, of milk from Mid-Am in an unsuccessful attempt to induce Mid-Am to sign a supply contract is no more

a Section 1 Sherman Act violation than any other seller's refusal to sell except on terms he regards as satisfactory.

14. NFO's supply contracts are ordinary buy-and-sell arrangements that do not constitute illegal price fixing.

19. Mid-Am has not, in any event, met its burden of proof that any of NFO's conduct was unreasonable, and only unreasonable restraints of traade violate Section 1 of the Sherman Act.

In light of our findings of fact and conclusions of law in regard to the liability questions presented in connection with Mid-Am's illegal boycott claim, we need not and therefore do not reach the questions presented by additional conclusions of law proposed by NFO in regard to damages in connection with that claim.

Conclusions Of Law Regarding NFO Membership Agreement As A Tying Arrangement

The conclusions of law proposed by Mid-Am and those proposed by NFO in connection with Mid-Am's claim that the NFO membership agreement must be considered as a tying arrangement are poles apart. Mid-Am proposed that we conclude as a matter of law that "[t]he NFO membership agreement clearly represents a tying contract . . . ." Indeed, Mid-Am argued that "there can be *no* question that the NFO Membership Agreement is a tying arrangement . . . ." (Mid-Am's post-trial brief, page 5; Mid-Am's emphasis). NFO proposed as its conclusion of law 20 that "[t]he 'exclusive representative' clause in NFO's membership agreement is not a tying arrangement violative of Section 1 of the Sherman Act."

The parties are in general agreement that principles of law applicable to tying arrangements are enunciated in *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 (1958); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953); *Fortner Enterprises, Inc.* v. *U.S. Steel Corp.*, 394 U.S. 495 (1969); and *U.S. Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610 (1977).

All of Mid-Am's conclusions of law proposed in connection with its tying arrangement claim are based on the proposed findings of ultimate facts as proposed by Mid-Am in its paragraphs 160 to 195, inclusive.[20] Those paragraphs either

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[20] Mid-Am proposed seven separate conclusions of law in connection with its tying arrangement claim. We have numbered the separate paragraphs as they appear on pages 38 and 39 of Mid-Am's proposed conclusions of law. Those paragraphs stated the following:

> 38-1. The NFO membership agreement clearly represents a tying contract because of economic power in the tying product, and a not insubstantial amount of commerce in the tied product.
>
> 38-2. Under the stipulated facts this Court finds and concludes that NFO does have economic power in the commodities of grain and livestock sufficient to establish the first criteria of a tying contract, and that the number of dairy producers participating in NFO programs on a nationwide basis is sufficient evidence of a not insubstantial amount of commerce being affected by the NFO Membership Agreement.
>
> 38-3. Sherman 1 (15 U.S.C. 1) prohibits tying arrangements involving services.
>
> 38-4. For a farmer to obtain the NFO services of bargaining in either grain or livestock (or both), that farmer must sign the NFO Membership Agreement which authorizes NFO to be his exclusive marketing agent for all commodities which includes milk; the NFO collective bargaining service in grain or livestock is a tying service, and the NFO marketing function in dairy is a tied service, and the Membership Agreement is a tying arrangement, in *per se* violation of Sherman 1 (15 U.S.C. 1).
>
> 38-5. NFO has sufficient economic power with respect to the tying product (NFO collective bargaining service in grain or livestock) to appreciably restrain free competition in the market for the tied product (NFO marketing function in dairy) and a sufficiently substantial amount of interstate commerce is affected in the tied product; therefore, the NFO tying arrangement constitutes a *per se* violation of Sherman 1 (15 U.S.C. 1).
>
> 39-6. Tying arrangements because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable without necessitating any inquiry as to the effect on the market, or the business reason for their use and are *per se* in violation of Sherman 1 (15 U.S.C. 1).
>
> 39-7. NFO's bargaining services in grain and livestock are different from its marketing service in milk, for the purposes of

accurately paraphase or quote the particular paragraphs of the stipulation of facts upon which they are based. It is thus clear that there is no substantial dispute about the underlying factual base upon which Mid-Am attempts to rely to support its tying arrangement argument.

NFO, of course, argues that Article I of the NFO membership agreement must be read in light of the exception stated in that article and in light of Article VII, Section 1 and Article XII, Section 3 of that agreement.[21] NFO further argues that Mid-Am has recognized that the NFO dairy program is voluntary and that Mid-Am, in fact, requested an admission from NFO which would agree that "the NFO dairy program is voluntary." That argument is based on NFO's proposed finding of fact 108. NFO bases an additional argument on its proposed findings of fact 105 to 113, inclusive. As we earlier

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applying the elements of a *per se* violation of Sherman 1 (15 U.S.C. 1); which require a "tying" service and a different "tied" service.

While the conclusions of law proposed by Mid-Am in paragraphs 38-3 and 39-6 may accurately state abstract principles of law, we refuse to make those proposed conclusions of law or the other conclusions of law proposed in the other tying arrangements paragraphs quoted in this footnote because of Mid-Am's failure to carry the burden of proof imposed on it by applicable law.

[21] Article I of the NFO membership agreement authorizes NFO to act for the member "as my exclusive representative in collective bargaining in respect to all commodities marketed from my farm." An exception, however, was created in that article for "those commodities presently covered by other marketing contracts." Article VII, Section 1 and Article XII, Section 3, provide, respectively, that an NFO member was "free to market his commodity as he chooses" until certain contracts or marketing procedures were established and that the NFO member could request a waiver from his area bargaining committee for matters "unforeseen at the time of signing of this agreement."

noted in connection with paragraphs 173 to 183 of our findings of fact, we make the following findings of fact proposed by NFO in those nine paragraphs which read as follows:

105. Mid-Am's claim that NFO has engaged in an illegal tying arrangement is based solely upon the terms of the NFO membership agreement and the availability of NFO bargaining services for grain and livestock, as well as for milk.

106. In the NFO membership agreement, each member authorizes NFO to act as his "exclusive representative in collective bargaining in respect to all commodities marketed from my farm, with the exception of those commodities presently covered by other marketing contracts." (PX 226)

107. However, an NFO member is not bound to market his milk through NFO solely on the basis of his membership agreement. (Mid-Am Narrative ¶ 164, Tr. 1352)

108. The NFO dairy program is voluntary. (Mid-Am Narrative ¶ 1106, Tr. 1352; Mid-Am Responsive Narrative ¶ 2450, Tr. 1353)

109. Many NFO members who produce more than one commodity market some of their commodities through NFO and some through other channels. (Mid-Am Responsive Narrative ¶ 2448, Tr. 1353)

110. It is the policy of NFO that, when a farmer executes an NFO membership agreement, he is not precluded from participating in a cooperative. (Mid-Am Narrative ¶ 1563, Tr. 1353)

111. There is no evidence that any dairy farmer who switched from Mid-Am to NFO ever actually marketed any commodity other than milk through NFO.

112. There is no evidence of the extent of NFO's market power in grain or livestock bargaining or marketing in central and southwestern Missouri or southern Illinois at any time.

113. There is not even any evidence of record that NFO offered grain or livestock bargaining services in the geographic areas relevant to this litigation.

We conclude that four out of the five conclusions of law proposed by NFO in connection with Mid-Am's tying arrangement claim are supported by the undisputed evidence in this case. We therefore state the following conclusions of law in regard to Mid-Am's tying arrangement claim:

20. The "exclusive representative" clause in NFO's membership agreement is not a tying arrangement violative of Section 1 of the Sherman Act.

21. [NFO proposed in this paragraph that we conclude a Capper-Volstead Act exemption is applicable. We need not and do not reach that question for the reasons we have already stated.]

22. Mid-Am's concession that the NFO dairy program is voluntary for NFO members precluded judgment for Mid-Am on its claim that farmers who wished to use NFO's livestock and grain-marketing services must market their milk through NFO.

23. Failure to prove the strength of NFO's market position in grain or livestock mrketing or a causal relationship between the "exclusive representative" clause and Mid-Am producers' switch to NFO or even the existence of NFO grain and livestock marketing services in Missouri and southern Illinois bars judgment for Mid-Am on its tying arrangement claim.

24. Failure to prove that the "exclusive representative" clause in NFO's membership contract is unreasonable bars judgment for Mid-Am on this portion of its Section 1 Sherman Act claim.

Conclusions Of Law Regarding NFO's Alleged Unfair Trade Practices

Mid-Am's proposed conclusions of law regarding NFO's alleged unfair trade practices were based upon the assumption

that findings of fact as stated in paragraphs 196 to 216 of its proposed findings of ultimate fact would be made in substantially the same form as proposed by Mid-Am. Comparison of the findings of fact as proposed by Mid-Am with those actually found by this Court reflects our view that Mid-Am has not carried the burden of proof in regard to the requisite factual circumstances necessary to support its legal theory in regard to NFO's alleged unfair trade practices.

Of at least equal, and perhaps even greater, importance is the fact that Mid-Am's post-trial brief reflects that part IX of that brief, entitled "N.F.O. conspired with others to use unfair trade practices to eliminate Mid-Am from bargaining for producers," was based primarily on the rationale of *Albert-Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir. 1932), *cert. den.* 286 U.S. 522 (1932), and the progeny of that case. Mid-Am concluded the argument made in that section of its brief by stating (on page 64) that: "Clearly, under the *Pick-Barth* doctrine and the later decisions recognizing and following the *Pick-Barth* doctrine, N.F.O. conspired and combined to use 'unfair trade practices' to eliminate Mid-Am from bargaining."

While the *Pick-Barth* rule had been cited and discussed in many of the district courts in the Eighth Circuit at the time the Phase I briefs were filed in this case, the Court of Appeals for the Eighth Circuit did not render any definitive decision in regard to that rule until it decided *Stifel, Nicolaus & Co.* v. *Dain, Kalman & Quail*, 578 F.2d 1256 (8 Cir. 1978) on June 15, 1978. In that case, after approving Chief District Judge McManus's detailed and comprehensive discussion of the present status of the *Pick-Barth* rule in his excellent district court opinion, *see* 430 F. Supp. at 1237-42, the Court of Appeals concluded that:

> We do not consider that this circuit has categorically either accepted or rejected the rule of *Pick-Barth*, either as originally announced or as modified. As a matter of policy, we decline to adopt it in present context. We do not think that the type of unfair competition charged here

should be characterized as a *per se* violation of § 1 of the Act. . . .

Where, as here, an antitrust plaintiff alleges nothing more than . . . unfair business practices . . . but does not allege any public injury resulting from the defendant's conduct, plaintiff must seek relief at common law and not under § 1 of the Sherman Act. Id. at 1260-61

In footnote 6 on page 1261, the Court of Appeals added:

Allegations that the predator is a significant factor in the market and has acted with intent to destroy plaintiff as a competitor do not transform such unfair business practices into *per se* Sherman Act § 1 violations.

We reject the seven conclusions of law proposed by Mid-Am in connection with its unfair practices claim.[22]

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[22] The conclusions of law proposed by Mid-Am in regard to NFO's alleged unfair trade practices, which we expressly reject, are as follows:

43-1. NFO, its employees and co-conspirators, engaged in unfair trade practices with the purpose of eliminating Mid-Am from the market of representing Mid-Am's members.

43-2. NFO's unfair trade practices included the withholding of milk from Mid-Am and its predecessors, threats to withhold milk from Mid-Am and its predecessors, solicitation of members of Mid-Am and its predecessors to become NFO members, picketing of processors who purchased milk through Mid-Am and its predecessors, and threats to destroy Mid-Am and its predecessors.

43-3. NFO violated federal antitrust, securities, and tax laws and supplied false information to the United States Department of Agriculture in moving into the marketing of milk in competition with Mid-Am.

43-4. NFO violated state anti-price discrimination statutes, securities laws, and non-solicitation laws in moving into the marketing of milk in competition with Mid-Am.

43-5. NFO knew, or should have known, that if Mid-Am signed an NFO Supply Contract which called for higher milk prices to be paid to NFO members than to non-NFO members, all of Mid-Am's members would join NFO, thus effectively

Mid-Am's proposed conclusions are rejected because they are not supported by the weight of the evidence and because those proposed conclusions are inconsistent with the view most recently stated by our Court of Appeals in regard to the *Pick-Barth* rule in *Stifel, Nicolaus & Co.* v. *Dain, Kalman & Quail, supra.*

We accept the following conclusions of law as proposed by NFO in regard to Mid-Am's claims regarding NFO's alleged unfair practices:

25. NFO's procurement of USDA qualification as a milk-marketing association under the Agricultural Marketing Agreement Act, regardless of how it was accomplished, had the effect of enhancing competition in federal-order markets and is therefore wholly consistent with the policy and purposes of Section 1 of the Sherman Act.

26. The absence of proof that a reduction in taxes or some other financial benefit resulted in NFO's claim of tax exemption under Section 501(c) of the Internal Revenue Code, regardless of the propriety or purpose of such claim, bears no relationship to competition and therefore cannot be the basis for finding a Section 1 Sherman Act violation.

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eliminating Mid-Am from the market of representing its members.

43-6. NFO, its employees and co-conspirators intended, by their unfair trade practices, to eliminate Mid-Am from the market of representing Mid-Am's members.

43-7. The willful submission of false information by NFO and its agents and employees to the U.S.D.A. to obtain qualification from the U.S.D.A. so that NFO could, through unfair methods, obtain a competitive advantage over Mid-Am and the conduct of NFO such as soliciting breaches of contract in violation of state laws, violating federal and state securities law, misrepresentations to IRS and violations of the income tax laws, in an effort to restrain competition, fix prices, and allocate markets and to eliminate Mid-America from the market of representing fluid milk producers, constituted a violation of Section 1 of the Sherman Act.

27. In the absence of proof that a reduction in interest rates or some other financial benefit resulted from those aspects of NFO's fund-raising or financing activities that Mid-Am attacks as securities law violations, those activities bear no relationship to competition and therefore cannot be the basis for finding a Section 1 Sherman Act violation.

28. Milk handlers, processors, haulers, and brokers who entered into normal business relationships with NFO as it pursued the NFO program for collectively marketing milk of its dairy-farmer members did not thereby become co-conspirators in any course of conduct intended by NFO to injure Mid-Am or interfere with the contractual relationships between Mid-Am and its members.

29. The record of evidence as to the involvement of outsiders in the various activities Mid-Am attributes to NFO is not sufficient to establish a combination or conspiracy violating Section 1 of the Sherman Act.

30. Milk haulers, milk brokers, bottling plants, manufacturing plants, and any other persons who entered into normal business relationships with NFO and its memberrs in their marketing of milk did not thereby conspire or combine with NFO in violation of Section 1 of the Sherman Act.

31. Mid-Am has not sustained its burden of proving that the purpose behind NFO's dairy program was to eliminate Mid-Am from the market of representing dairy farmers.

32. Mid-Am has not, in any event, met its burden of proving that any of NFO's conduct was unreasonable, and only unreasonable restraints of trade violate Section 1 of the Sherman Act.

Conclusions Of Law In Regard To Mid-Am's Robinson-Patman Claim

Mid-Am's Robinson-Patman claim, for which it seeks no specific damages, is based upon paragraphs 217 to 222, inclusive, of its proposed findings of ultimate fact. Out findings of

fact show that we found only the facts as they had been stipulated and that we rejected the inferences which Mid-Am would have this Court make from the undisputed factual data. Mid-Am's proposed conclusion of law are set forth in the footnote below.[23]

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[23] The conclusions of law proposed by Mid-Am in regard to Mid-Am's Robinson-Patman claim, which we expressly reject, are as follows:

> 45-1. NFO's Milk Supply Contracts require payment of a commission to NFO in connection with the sale of milk by NFO members in violation of Section 2(c) of the Robinson-Patman Act.
>
> 45-2. NFO is a person within the meaning of Section 2(c) of the Robinson-Patman Act which forbids the receipt by a "person" in the course of commerce of a commission in connection with the sale of goods.
>
> 46-3. The payments of purchasers of milk under NFO Milk Supply Contracts were payments made in the course of NFO's commerce, within the meaning of Section 2(c) of the Robinson-Patman Act.
>
> 46-4. Payments to the NFO by the purchasers under the NFO Milk Supply Contracts were payments which violated Section 2(c) of the Robinson-Patman Act.
>
> 46-5. Under the NFO Milk Supply Contracts, the NFO received a payment fom the other party to Milk Supply Contracts, which payment was in violation of Section 2(c) of the Robinson-Patman Act.
>
> 46-6. The NFO Milk Supply Contracts required that a commission be paid by the purchaser of milk to the seller over and above the payment of the base price for the milk itself, in violation of Section 2(c) of the Robinson-Patman Act.
>
> 46-7. The sale of milk by NFO pursuant to the NFO Milk Supply Contracts was a sale of goods, wares or merchandise within the purview of Section 2(c) of the Robinson-Patman Act.
>
> 46-8. The amount of the commission required by any particular NFO Milk Supply Contract to be paid to NFO was negotiated, thus, the commission was discriminatory in violation of Section 2(c) of the Robinson-Patman Act.
>
> 46-9. NFO provided no actual services in exchange for receiving a "commission" pursuant to its Milk Supply Contracts;

We find and conclude that the stipulated factual circumstances of this case, when considered in light of all other facts and circumstances established by the additional evidence at trial, do not support Mid-Am's Robinson-Patman claim. See *Federal Trade Com'n.* v. *Broch & Co.*, 363 U.S. 166, 168-169 (1960).

While we do not believe that *Waters* v. *National Farmers Organization, Inc.*, 328 F. Supp. 1229 (S.D. Ind. 1971), can be said to support NFO's Capper-Volstead exemption argument (for the reason that, as *Sunkist II* said about *Sunkist I*, the question of non-producer members was not in focus in the earlier case), we agree with Chief Judge Steckler's conclusion and discussion in that case in regard to § 2(c) of the Clayton Act as amemded by the Robinson-Patman Act.

We therefore state the four following Robinson-Patman Act conclusions of law, keyed to the conclusions proposed by NFO:

33. The "services rendered" fee provided for in NFO's supply contracts does not violate Section 2(c) of the Clayton Act.

34. The "services rendered" fee is not a Section 2(c) violation in any event since Mid-Am has not shown that the purchasing processors and bottlers failed to make the same or similar payments or benefits available to non-NFO members or their organizations.

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thus, those, contracts violated Section 2(c) of the Robinson-Patman Act.

46-10. The NFO Milk Supply Contracts violate Section 2(c) of the Robinson-Patman Act, and, therefore, all acts which were taken by NFO to force Mid-Am to sign such an illegal contract are beyond any antitrust exemption.

47-11. NFO signed NFO Supply Contracts, as agent for its members, which required the purchaser of milk to pay an additional fee to the NFO Dairy Trust; such fees were brokerage, commission or "other compensation" paid to the agent of the members by the purchasers of the NFO members' milk in violation of Section 2(c) of the Robinson-Patman Act.

35. Mid-Am failed to prove that processors and bottlers signing NFO supply contracts in fact discriminated against other producers or producer organizations.

36. Failure to claim or prove damages attributable in any way to NFO's supply contracts deprives Mid-Am of a cause of action under Section 2(c) and Section 4 of the Clayton Act against NFO on the basis of such supply contracts.

CONCLUSIONS OF LAW IN REGARD TO NFO'S ALLEGED VIOLATION OF MISSOURI LAW

Mid-Am proposed the following two conclusions of law in regard to NFO's alleged violation of Missouri law:

> 50-1. NFO through its officers and employees knowingly induced members of Mid-Am, a Kansas Cooperative Marketing Association, duly qualified to do business in Missouri, to break their marketing contracts with Mid-Am in violation of Section 274.260, R.S. Mo. 1969, and is liable to Mid-Am in these proceedings for a civil penalty of $500 for each such offense.[24]
>
> 50-2. This Court has jurisdiction over this matter due to diversity of citizenship of the parties, 28 U.S.C. 1332, and by virtue of pendant [sic] jurisdiction resulting from the original jurisdiction claims of plaintiff alleging defendants violation of 15 U.S.C. 1.

Mid-Am argues that the evidence "clearly establishes" that NFO violated Mo. Rev. Stat. § 274.260. Mid-Am's argument that NFO "knowingly induced members of Mid-Am . . . to break their marketing contracts with Mid-Am," as proposed in

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[24] Mo. Rev. Stat. § 274.260 provides, in pertinent part, that:

> Any person . . . or any corporation whose officers or employees knowingly induce or attempt to induce any member of an association . . . organized under similar statutes of other states . . . and operating in this states . . . to break his marketing contract with the association, or who maliciously and knowingly spreads false reports about the . . . activity thereof, shall be guilty of a misdemeanor and . . . shall be lible to the association aggrieved in a civil suit in the penal sum of five hundred dollars for each such offense.

conclusion 50-1, is based on the theory that such an inference should be drawn from the undisputed fact that when NFO employees solicited dairy farmers in central and southwest Missouri to get a supply of milk for the NFO reload program, those NFO employees knew of facts which indicated the probability that those dairy farmers may have had existing marketing agreements with Mid-Am.

Mid-Am further argues that the stipulated fact that over sixty dairy farmers who were contacted by NFO employees ceased to market with Mid-Am some two months after such a contact supports an inference that what may have been said by the NFO employees in fact induced the dairy farmer to break his marketing agreement with Mid-Am and the further inference that a breach of contract did in fact occur.

NFO argues that § 274.260 is a penal statute and that Mid-Am's claim based on that statute must be dismissed because the Court lacks jurisdiction over the subject matter. NFO relies upon language and principles stated in *State of Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 26 (1888) and *Huntington* v. *Attrill*, 146 U.S. 657 (1892), to support its jurisdictional argument. NFO further argues that "quite aside from having a jurisdictional problem, Mid-Am simply has not put together a case under the State statute."

We are not impressed with and do not accept NFO's argument that § 274.260 is a penal statute and that this Court has no jurisdiction to enforce the same. Section 274.260 was adopted by the State of Missouri in 1923 at a time when similar statutes were being passed by many of the other States. See *Warehouse Co.* v. *Tobacco Growers*, 276 U.S. 71 (1928), in which the Supreme Court concluded that §§ 26 and 27 of the Bingham (or Standard) Cooperative Marketing Act of Kentucky did not violate the Constitution. Section 26 of the Kentucky Act contained in substance the same provisions as does Missouri 274.260. The Court observed in *Tobacco Growers* that "cooper-

ative marketing statutes substantially like the one under review have been enacted by forty-two States."[25]

We are satisfied that most courts would label such legislation to be "remedial" rather than "penal" and, after an appropriate attachment of label, would thereafter permit enforcement of the civil remedy therein provided. So far as this case is concerned, the question is moot because we do not believe that the evidence adduced by Mid-Am is sufficient to support the factual assumptions upon which its proposed conclusions of law rely. Our findings of fact show that we rejected Mid-Am's proposed findings of fact that "NFO solicited members of Mid-Am (224) *to breach their milk marketing agreements* with Mid-Am;" (225) ". . . to withhold their milk from Mid-Am *in violation of their milk marketing agreements;*" and (226) ". . . to market their milk through NFO instead of Mid-Am *in violation of their milk marketing agreements with Mid-Am.*" (emphasis ours). We also rejected Mid-Am's proposed finding of fact 231 which stated that "NFO induced the following Missouri dairy farmers *to break their marketing contracts with Mid-Am:* [naming 68 Missouri dairy farmers]." [emphasis ours]

The names of the 68 dairy farmers listed in Mid-Am's proposed finding 231 were taken from Plaintiff's Exhibit 99 (Exhibit A of plaintiff's damage summary), Plaintiff's Exhibit 98 (Exhibit B of plaintiff's damage summary), and Plaintiff's Exhibit 97 (Exhibit B-2 of plaintiff's damage summary). In its effort to support paragraph 231 of its proposed finding of ultimate fact, Mid-Am directed attention to the paragraphs of

[25] Interestingly enough, those state statutes were passed as part of a movement to "save the farmer," which followed in the wake of the agricultural depression which followed World War I. The Court further noted in *Warehouse Co.* v. *Tobacco Growers* that the Capper-Volstead Act and the Cooperative Marketing Act of 1926 were also a part of that broad state and federal legislative movement designed to enable an agricultural producer to obtain a fair price for his products.

the stipulation of facts which stated in regard to some but not all the dairy farmers listed in paragraph 231, that, for example, "on January 21, 1970, Hills [an NFO employee] *talked* to John Watterson, Mansfield, Missouri, Wright County (Hills Exhibit 42)" [emphasis ours]. Other evidence in the case would support a finding that John Watterson, for further example, did, in fact, cease shipping with Mid-Am on March 10, 1970.

Examination of Mid-Am's Exhibit 99 establishes that most of the persons listed on that exhibit were "talked to" by Hills on some date in the month of January, 1970 and that most of those persons ceased shipping with Mid-Am sometime during the month of March, 1970. There is no direct evidence, however, that Hills attempted to induce Watterson to break his marketing agreement with Mid-Am. Indeed, there is no substantial evidence that Watterson may have in fact breached his contract when he ceased shipping with Mid-Am. The same thing is true of the other persons listed in Mid-Am's paragraph 231.

The evidence further shows that some of the dairy farmers listed on Mid-Am's three damage exhibits never executed any marketing agreement with Mid-Am at any time and that a substantial number of the dairy farmers listed has signed agreements with Square Deal Milk Producers Association, Producers Creamery Company, and Sanitary Milk Producers, all predecessors of Mid-Am. Each of the four different kinds of contracts attached to Mid-Am's damage exhibits contain different termination provisions.

The prime difficulty with Mid-Am's proof lies in the fact that with the possible exception of one producer, there simply is no substantial evidence of *breach* of any contract. The stipulated fact that NFO solicited members of Mid-Am to market their milk through NFO, standing alone, simply does not support a finding of fact or a conclusion of law that NFO's solicitation was for the purpose of inducing all dairy farmers marketing through Mid-Am to break their contracts within the meaning of § 274.260. We therefore reject Mid-Am's proposed conclusions of law for the reasons stated.

NFO proposed nine conclusions of law contained in its paragraphs 37 to 45, inclusive, in regard to Mid-Am's violation of Missouri law claim. We reject all of NFO's proposed conclusions of law except those proposed in paragraphs 39 and 40. Those paragraphs as modified, are as follows:

> 39. The evidence does not support a finding that NFO knowingly induced Mid-Am members to breach their marketing contracts with Mid-Am in violation of Missouri Rev. Stat. 274.260.
>
> 40. Mid-Am's evidence regarding the departure of its members who shifted to NFO does not establish that they in fact breached their contracts.

CONCLUSIONS OF LAW
IN REGARD TO PLAINTIFF'S DAMAGES

The findings of fact made and the conclusions of law heretofore stated require that judgment be entered for NFO on all of the claims asserted by Mid-Am in connection with Phase I of this litigation. It is therefore obvious that we need not and therefore do not reach the merits of Mid-Am's claim for damages.

In order, however, that our memorandum opinion in regard to Phase I reflect all conclusions of law proposed by both parties, we set forth in the footnote below the single conclusion of law on damages proposed by Mid-Am and the single conclusion of law on damages proposed by NFO.[26]

An appropriate order therefore will be entered in regard to Phase I of this case which will direct the Clerk to enter judgment against Mid-Am in regard to its Phase I claim and in favor of NFO.

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[26] Mid-Am proposed the following conclusion of law on damages:

> 51-1. Mid-America Dairymen, Inc., having been injured in its business and property within the meaning of Section 4 of the Clayton Act (15 USC 15) by virtue of the violation of Section 1 of the Sherman Act (15 USC 1) of defendant National Farmers Organization, is entitled to judgment in the amount of

PHASE II FINDINGS OF FACT REGARDING NFO'S COUNTERCLAIM

Introduction

We have carefully considered all of the proposed findings of fact and all of the proposed conclusions of law submitted by the parties in connection with Phase II of this litigation. It is our ultimate determination that under all the facts and circumstances, NFO failed to carry the burden of proof in regard to all Phase II issues necessary to establish liability on the part of the counterclaim defendants. In order that this Court's findings and conclusions in that regard may be subject to meaningful appellate review, we have used NFO's proposed findings of fact as the basis for making our detailed findings of fact on the issue of liability. Our acceptance, modification, and rejection of each paragraph of NFO's proposed findings of fact in regard to liability will clearly reveal our resolution of the various areas of factual dispute and our view of what inferences may properly be drawn from factual circumstances which were established either by the stipulations or admissions of the parties or by the weight of all the evidence adduced at trial as we viewed it.

Under our view of Phase II of this litigation, it is necessary that we consider and state our findings of fact only in regard to Parts I through X, inclusive (paragraphs 1 to 2017) of NFO's proposed findings of fact. The record should therefore show that we reject all of NFO's proposed findings of fact as contained in Parts XI to XV, inclusive (paragraphs 2018 to 2488),

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$1,989,350.00 single damages, to be trebled, to the amount of $5,968,050.00 and for reasonable attorneys' fees and its costs incurred herein.

NFO proposed the following conclusion of law on damages:

> 46. None of the damages claimed by Mid-Am are recoverable under Section 4 of the Clayton Act, since they are all "designed to provide [Mid-Am] with the profits [it] would have realized had competition been reduced," within the meaning of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

for the reason that all those findings are proposed in connection with NFO's claims of damages, issues which we need not and therefore do not reach in light of our determination of the liability issues presented in Phase II of this case.[27]

It should also be noted that our determination that NFO has failed to carry the burden of proof on the issues of liability makes it unnecessary to reach a number of other questions presented in Phase II of this case. Although many of the findings of fact proposed by Mid-Am, AMPI, and CMPC in Parts I to XII (paragraphs 1 to 8423, inclusive) of their joint proposed findings of fact reiterate those parties' detailed view of the evidence as stated, for the most part, in their joint response to NFO's proposed findings of fact, it is neither necessary nor appropriate to deal separately with the 8,423 paragraphs of those jointly proposed findings of fact.

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[27] NFO's proposed findings of fact 2018 to 2026, inclusive, contained in part XI of its proposed findings and entitled "Beatrice Fort Worth Damages," claims damages in the amount of $151,135.02. NFO's proposed findings of fact 2063 to 2065, inclusive, contained in part XII of its proposed findings and entitled "Pressure Pooling Damages," claims damages in the amount of $137,786.74. NFO's proposed findings of fact 2066 to 2080, inclusive, contained in part XIII of its proposed findings and entitled "Chicago Damages," claims damages in the amount of $924,248.00. NFO's proposed findings of fact 2098 to 2488, inclusive, contained in part XV of its proposed findings and entitled "NFO Lost Penetration Damages," claims damages in the amount of at least $12,850,899.00.* NFO thus claimed total damages in the amount of $14,064,068.76. NFO also proposed in its conclusion of law No. 21 a claim for additional damages by requesting a finding that NFO "is entitled to recover attorneys' fees and costs of defending against defendants bad faith litigation."

* Part XIV of NFO's proposed findings of fact, containing paragraphs 2081 to 2097, inclusive, and entitled "NFO's Customers and Market Penetration," does not contain any proposed finding claiming any particular amount of damages. The purpose of the proposed findings contained in that part of NFO's proposed findings reflected NFO's attempt to support the alleged reasonableness of its damage estimates.

ARSPC separately proposed the relatively small number of 305 findings of fact. Although a very substantial number of ARSPC's proposed findings are either expressly admitted by NFO in its response or are based upon documentary evidence, neither is it necessary to make the findings of fact proposed by ARSPC. Our Phase II conclusions of law will make clear that we agree with the findings proposed by ARSPC in its paragraphs 301 to 304 of the "Conclusions" section of its proposed findings of fact which actually present mixed findings of fact and conclusions of law in regard to whether NFO carried the burden of proving the particular matters discussed in each of those proposed findings.

Our view and determination of the liability issues of Phase II also makes it unnecessary to reach various other legal questions which include the questions (1) whether venue is proper in regard to CMPC; (2) whether NFO lacks standing under Section 4 of the Clayton Act; (3) whether NFO should be precluded from asserting its claims for damages for various alleged losses because of alleged violations of Pretrial Orders Nos. 10, 11, and 12; and (4) whether, in any event, NFO's damage evidence was so conjectural and speculative as to be inadmissible. Nor is it necessary to reach the Capper-Volstead and Clayton Act antitrust exemption claims made by Mid-Am, CMPC, and ARSPC in defense of NFO's Phase II counterclaim.

It is for the reasons above stated that our findings of fact in regard to Phase II of this litigation will be keyed to the paragraphs 1 to 2017, inclusive, of NFO's proposed findings of fact. After making our findings of fact, we shall state our Phase II conclusions of law, keyed to those conclusions proposed by the respective parties.

I. The Case And The Parties

1. This action was brought by The National Farmers' Organization, Inc. (NFO), as counterclaim plaintiff, against Mid-America Dairymen, Inc. (Mid-Am), Associated Milk Produc-

ers, Inc. (AMPI), Central Milk Producers Cooperative (CMPC), and Associated Reserve Standby Pool Cooperative (ARSPC).

2. NFO claims that Mid-Am, AMPI, CMPC and ARSPC, in combination with others, have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Sections 3 and 7 of the Clayton Act, 15 U.S.C. §§ 14 and 18, and seeks treble damages and injunctive relief as authorized by Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

3. NFO was formed in 1955 as a not-for-profit, non-stock coproration under Iowa law and has its principal office in Corning, Adams County, Iowa.

4. NFO is a national membership organization, having as its members farmers who produce all kinds of farm commodities. NFO, during relevant periods of time, had a small number of non-producer members.

5. Mid-Am is an agricultural cooperative organized in 1968 under the laws of the State of Kansas.

6. Mid-Am's headquarters is at Springfield, Missouri, and its principal states of operation are Minnesota, Wisconsin, Iowa, Nebraska, Kansas, Missouri, Illinois, Arkansas and Texas.

7. AMPI is an agricultural cooperative organized in 1969 under the laws of Kansas.

8. AMPI's headquarters is at San Antonio, Texas, and its principal states of operation are Wisconsin, Minnesota, Nebraska, South Dakota, Iowa, Kansas, Indiana, Illinois, Oklahoma, Arkansas and Texas.

9. CMPC is an agricultural cooperative organized in 1968 and existing under the laws of the State of Wisconsin.

10. CMPC's headquarters is at Chicago, Illinois, and its principal states of operation are Wisconsin and Illinois.

11. ARSPC is an agricultural cooperative organized in 1970 under the laws of Nebraska.

12. ARSPC's members consist of most of the major farmer cooperatives throughout the area generally referred to as the South and Midwest.

13. NFO claims that the defendants, with others, have jointly combined and conspired to fix, raise, or stabilize prices, restrain trade, monopolize, and attempt to monopolize the marketing of raw Grade A milk in the Midwestern United States and various sections thereof in violation of Sections 1 and 2 of the Sherman Act.

14. NFO also claims that AMPI and Mid-Am have engaged in mergers or acquisitions, the effect of which has been to substantially lessen competition or tend to create a monopoly in the marketing of raw Grade A milk in various sections of the Midwestern United States in violation of Section 7 of the Clayton Act.

15. NFO also apparently claims, but did not brief such claim, that AMPI, Mid-Am, CMPC and ARSPC have made sales or contracts for sale of raw Grade A milk, the effect of which has been to substantially lessen competition or tend to create a monopoly in the marketing of raw Grade A milk in various parts of the Midwestern United States in violation of Section 3 of the Clayton Act.

II. Trade And Commerce: Milk Marketing In General

A. Grade A Milk

16. Grade A milk is milk approved by individual state and/or local governmental authorities for sale as fluid milk for human consumption.

17. Unless milk is produced under sanitary conditions sufficient to meet the requirements of local public health authorities for fluid consumption and classified as Grade A, the milk is classified as Grade B and may be used only in manufactured products.

18. Grade A milk is ultimately sold to consumers either in the form of fluid milk or as processed manufactured milk products, such as butter, cheese or powered milk.

19. Grade A milk loses its Grade A status if it is commingled with Grade B milk.

20. Grade A milk is the only milk regulated and priced under the Federal Order System, administered pursuant to the Agriculture Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.*

21. Different and more strict sanitary conditions are needed for the production of Grade A milk, as compared to Grade B milk. Federal regulations apply only to Grade A milk. Grade A and Grade B milk may be put to different uses. Grade A milk which is not disposed of for fluid purposes, however, has the same value and is used to produce the same products as Grade B milk.

B. Supply And Assembly Patterns

22. Dairy cows are milked twice daily and their milk, if Grade A, is collected and stored in refrigerated "bulk tanks" on the farm until it is picked up by milk haulers, either daily or every other day.

23. Because fluid milk is highly perishable even when refrigerated, milk cannot be stored for extended periods of time and must be quickly transported to market.

24. Raw milk may be transported from the farm either to a "reload" or "receiving station" for reshipment to a "distributing" plant, or to a manufacturing plant either for processing into "hard products" or for reshipment in the form of fluid milk to "distributing" plants.

25. A distributing plant receives raw milk for processing into and subsequent distribution as fluid milk products.

26. In the states of Minnesota, Wisconsin, Iowa, Illinois, Missouri and Nebraska, the general practice is for a "milk hauler," operating on a "route," to pick up milk at farms every day in "farm tank trucks" which range in capacity from 15,000 pounds to approximately 30,000.

27. In the states of Minnesota, Wisconsin, Iowa, Illinois, Missouri and Nebraska, milk of several hauling routes may be combined or "reloaded" at a "reload plant" into an over-the-road tank truck of approximately 48,000 pound capacity for delivery to a plant distant from the point of production.

28. Generally, milk is delivered from a supply plant—i.e., a reload or manufacturing plant that reships the milk—to a regulated distributing plant in an over-the-road tank truck in order to minimize the unit cost of transporting milk.

29. Using large tank trucks, milk may be transported to markets over 1,000 miles from the production area.

30. Since at least 1950, large quantities of milk have been shipped daily from farmer-producers in one state to distributing or manufacturing plants ("handlers") in other states.

31. There is substantial interstate commerce involved in the production, assembly, shipment, sale, and processing of milk.

32. The quantity of milk produced, and therefore the supply of milk available to the bottler or manufacturer, fluctuates seasonally with the reproductive cycle of the dairy cow.

33. Milk production generally increases after calving season in the spring and early summer when pastures are most abundant.

34. Milk production generally declines during the summer and reaches the lowest point during the fall months.

35. In most areas of the United States, the demand for fluid milk is greatest in the early fall when milk production is near its lowest point.

36. As a result of the non-complementary patterns of supply and demand fluctuations, a milk production level sufficient to ensure an adequate supply of fluid milk in periods of maximum demand tends to create surpluses, or reserves, of fluid milk during much of the remainder of the year.

37. As a result of climatic and topographical factors, dairy farms are most numerous and milk production is greatest in Minnesota and Wisconsin, which together account for approximately 25 percent of the nation's total annual milk production.

38. In the mid-1960's increasing numbers of producers in Minnesota and Wisconsin were converting from Grade B to Grade A milk production.

39. In the mid-1960's producers in the North who made the expenditures for conversion to Grade A expected to receive higher prices for their milk.

40. In order to receive a higher price for their Grade A milk, Northern producers have usually sought to have their milk associated with federal order markets and to receive federal order markets and to receive federal order minimum prices.

41. The supply of Grade A milk in Minnesota and Wisconsin has been increasing since 1965 at a rate faster than the demand for fluid milk in the federal order areas that include any part of those states.

42. The production of Grade A milk in Minnesota, Wisconsin, and Iowa exceeds the demand for fluid milk in nearby metropolitan areas.

C. Federal Milk Marketing Regulations In General

43. A federal milk marketing order is an order issued by the U. S. Department of Agriculture (USDA) pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 601, *et seq.*) and applicable rules of practice and procedure relating to the handling of milk.

44. Federal milk marketing orders establish classes of, and minimum prices to be paid for, milk according to the form in which or the purpose for which milk is used or sold by a "handler" in a regulated marketing area.

45. A milk marketing order is established by the Secretary upon the petition of farmer-producers, after a hearing.

46. After receiving a petition, the Secretary of Agriculture makes a preliminary investigation to determine whether regulation of the proposed marketing area would tend to effectuate the declared policy of the Act.

47. If, after preliminary investigation, the Secretary determines that a milk marketing order would promote the purposes of the Act, a rule-making hearing is convened for the purpose of receiving evidence as to the appropriate provisions that should be included in the order.

48. A milk marketing order cannot become effective unless it is approved in a referendum vote by at least two-thirds (2/3) of the dairy farmers who are determined by the Secretary to be eligible to vote as "producers" under the proposed order.

49. The bloc-voting provisions of the Agricultural Marketing Agreement Act permit farmer cooperatives to cast the votes of their members as a bloc, and a proposed order or an amendment is approved upon th affirmative vote of cooperatives representing at least two-thirds (2/3) of the producers pooled under the order.

50. The Market Administrator is a USDA employee appointed by the Dairy Division to administer a federal milk marketing order.

51. A federal milk order regulates "handlers;" a "handler" generally is defined as the operator of a plant which receives Grade A milk: (a) for sale or distribution as fluid milk products in the regulated marketing area; or (b) for resale as the raw milk to a regulated handler who sells or distributes fluid milk products.

52. A producer marketing association or cooperative may also qualify as a "handler with respect to the milk of its members which the association causes to be delivered to the pool plant of another handler even though the association is not itself the operator of a pool plant.

53. Prior to 1974, most federal milk market orders had two use classifications for milk: Class I and Class II.

54. In two-class orders, milk used to produce "fluid" products such as whole milk, low-fat milk, skim milk, buttermilk and sweet cream, was generally classified as Class I.

55. In two-class orders, milk used to produce "manufactured" products, such as ice cream, condensed and evaporated milk, milk powder, butter and cheese, was generally classified as Class II.

56. Federal orders establish minimum prices for each use classification of milk.

57. For Grade A milk that is not used for fluid consumption, a lower minimum Class II or Class III price is established at levels which approximate the value of Grade B or manufacturing grade milk used to produce dairy products such as powdered milk, butter and cheese.

D. Class II Pricing: The M-W Series

58. Consistently, over half of the manufacturing grade (Grade B) milk marketed in the United States is produced in Minnesota and Wisconsin.

59. Prices paid by manufacturing plants for Grade B milk in Minnesota and Wisconsin are not regulated.

60. Prices paid by manufacturing plants for Grade B milk in Minnesota and Wisconsin reflect conditions of supply, demand and competition.

61. Since dairy products manufactured from Grade A surplus milk (Class II milk in two-class orders) compete in the same national market with products manufactured from unregulated Grade B milk, almost all federal milk orders provide that the Class II price shall be the Minnesota-Wisconsin (M-W) Series price for the month.

62. The M-W Series price is calculated by the U. S. Department of Agriculture each month by sampling the prices paid by manufacturing plants for manufacturing grade milk in the Minnesota and Wisconsin production area.

63. The M-W price sample taken by the USDA does not include prices paid for Grade A milk diverted to manufacturing uses.

64. The first step in calculating the M-W Series price is estimation of the average price for the "base month," which is the month preceding that to which the M-W price estimate relates.

65. In the M-W sample used to estimate "base month" price, the USDA obtains reports from about 200 plants in Wisconsin and 120 in Minnesota, which plants purchase approximately 60 percent of the manufacturing grade milk sold in these states.

66. To obtain the current month's M-W Series price, USDA estimates the price change from the base month to the current month by reference to reports from 110 plants (about 40 in Minnesota and 70 in Wisconsin).

67. The average price derived from the sampling conducted by the USDA is referred to as the Minnesota-Wisconsin Series price, or M-W price, and serves as the basic formula price for establishing Class I, Class II and Class III minimum prices in most federal orders.

E. Class I Prices

68. The Class I price, for any month, in a federal milk order is established by adding a "Class I fluid differential" to the basic formula, or M-W price, for the second preceding month.

69. The higher Class I price is designed to compensate a producer for the extra cost of producing Grade A milk and to ensure an adequate supply of wholesome milk for the fluid market.

70. The "Class I fluid differential" in federal milk orders is ordinarily set at a level which is designed to reflect Grade A milk production costs, supply and demand for fluid milk, and the cost of transporting Grade A milk from the surplus production area of Minnesota and Wisconsin.

71. Class I minimum prices are lowest in the Minnesota and Wisconsin federal order markets and increase, with distance, from those markets at the rate, approximately, of 1.5 cents per cwt. for each 10 miles.

72. The amount by which Class I prices increase with distance (1.5 cents per cwt. for each 10 miles) may or may not be sufficient to offset the cost of transporting the milk.

73. The "Class I fluid differentials" increase with distance from the surplus production area of Minnesota and Wisconsin to reflect the cost of transporting milk from those areas to markets to the South, Southeast and Southwest.

F. Blend Prices

74. "Reblending" is the process whereby a cooperative combines the proceeds from the sale of its members' milk in one or more markets and establishes a uniform pay price for all those members different from the federal order blend price in any market for any month.

75. Farmer-producers whose milk is pooled under a federal order receive, as a minimum, a "blend price" for their milk which is the weighted average of the Class I and Class II prices for the month.

76. As a simplified example of the blend price calculation: where the Class I price is $8.00 per cwt. and 1,000,000 pounds of milk is sold for fluid use during the period; and where the Class II price is $5.00 per cwt. and 500,000 pounds of milk is sold for use in manufactured products during the period, the blend price equals:

$$\frac{8(10{,}000) + 5(5{,}000)}{15{,}000} = \$7.00 \text{ per cwt.}$$

77. If the M-W or Class II price remains constant, the blend price in any federal milk order will fluctuate in direct relation with the relative quantity of milk sold under the order for Class I or fluid use.

78. When the amount of milk classified as Class I or fluid use in a federal order increases relative to the total quantity of milk priced under that order, the blend price increases.

79. When the amount of milk classified as Class I or fluid use in a federal milk order decreases relative to the total quantity of milk priced under that order, the blend price decreases.

80. The Class I minimum price is always higher than the announced federal milk order blend price.

81. In an order with two classes of milk, the Class II minimum price is almost always lower than the federal milk order announced blend price.

82. Federal order blend prices are usually higher than prices paid by unregulated plants for Grade B or manufacturing grade milk, except that, in Minnesota and Wisconsin, prices paid for manufacturing grade milk sometimes have exceeded the federal order blend prices at certain locations.

G. Class I Utilization

83. The amount of milk classified as Class I under a federal milk order expressed as a percentage of all milk classified and priced under that order during a month is referred to as the "Class I utilization" of that market for the month.

84. As a simplified example of the Class I utilization calculations: where 1,000,000 pounds of milk are classified as disposed of for Class I or fluid use during the period; and where 500,000 pounds of milk are classified as used to produce manufactured products during that same month, the Class I utilization is expressed as follows:

$$\frac{1,000,000}{1,500,000} = .66 \text{ or } 66\%$$

H. The Pooling And The Producer-Settlement Fund

85. Each regulated handler in a federal milk order must account to the Market Administrator for the milk used in each

classification on the basis of the minimum price for that classification and must pay his producer suppliers the federal order announced blend price; differences are eliminated through a Producer Settlement Fund administered by the Market Administrator.

86. The Producer Settlement Fund eliminates differences by requiring handlers who have a greater than average Class I utilization to pay into the fund the difference between the blend price which they paid their producer suppliers and the classified value of the milk they received while the fund pays handlers who have a lower than average Class I utilization the difference between the blend price which they paid their producer suppliers and the classified value of the milk they received.

87. The operation of the producer settlement fund is illustrated as follows:

PRODUCER SETTLEMENT FUND CALCULATION FOR A GIVEN MONTH

ASSUMPTIONS*

A:	Class I Price	= $8.00
B:	Class I Quantity	= 10,000 cwt.
C:	Class II Price	= $5.00
D:	Class II Quantity	= 5,000 cwt.
E:	Beatrice uses 10,000 cwt. of milk; 7,000 cwt. in Class I and 3,000 cwt. in Class II	
F:	Foremost uses 5,000 cwt. of milk; 3,000 cwt. in Class I and 2,000 cwt. in Class II	

* Computation does not include adjustment for location differentials applicable under the provision of the Federal Orders.

CALCULATIONS

Step 1: Beatrice pays its producer suppliers for: its Quantity (10,000 cwt.) x Blend Price ($7.00) = $70,000

Step 2: Beatrice owes the producer settlement fund:

a) its Class I Quantity (7,000 cwt.) x Class I Price ($8.00) = $56,000

b) its Class II Quantity (3,000 cwt.) x Class II Price ($5.00) = $15,000

$71,000

c) $56,000 + $15,000 = $71,000 - the amount paid producers ($70,000) = $1,000

Step 3: Foremost pays its producer suppliers for: its Quantity (5,000 cwt.) x Blend Price ($7.00) = $35,000

Step 4: Foremost owes the producer settlement fund:

a) its Class I Quantity (3,000 cwt.) x Class I Price ($8.00) = $24,000

b) its Class II Quantity (2,000 cwt.) x Class II Price ($5.00) = 10,000

$34,000

c) $24,000 + $10,000 = $34,000 - the amount paid producers ($35,000) = $1,000

Step 5: Beatrice pays the Fund $1,000 and the Fund pays Foremost $1,000

88. An individual producer who does not ship his milk through a qualified cooperative marketing association is entitled to receive the federal order blend price for his milk if it is deemed to have been received at a pool plant and pooled in the manner prescribed by the applicable federal milk order.

89. Milk received from a producer in any month at a plant which is regulated by a federal milk order is referred to as "pooled milk," and the plant operated by a regulated handler is referred to as a "pool plant."

90. The milk produced by an individual producer is included in a federal milk order pool for a relevant accounting period of some portion of the milk, as specified in each federal

milk order, is deemed to have been received during the month at a "pool plant."

91. In quantities and in the manner specified by the provisions of the various federal market orders, Grade A milk may be diverted by a cooperative or regulated handler from the "pool plant" at which it is pooled, without being physically received at that plant, to unregulated manufacturing plants for non-fluid Class II or Class III uses.

92. Grade A milk properly diverted to an unregulated manufacturing plant (known as diverted milk) is pooled on a federal order as Class II or Class III milk by the cooperative or the diverting regulated handler, and the producers delivering diverted milk, or their marketing organization, will be entitled to receive federal order blend price for the diverted milk.

93. Grade A milk which is shipped by a handler regulated under one federal order to a handler regulated on a different federal order is "pooled" under the federal milk marketing system on the order from whose area it is shipped and is classified in the second order "other order milk."

94. "Other order milk" is classified in accordance with the use to which it is put in the area to which it is shipped, but the farmer-producers of such milk (or their marketing organization) receive the blend price established under the federal order for the area in which the milk was first pooled.

I. Cooperative Qualification

95. A qualified cooperative marketing association is entitled to receive the order blend price for the milk of those members of the association whose milk qualified for pooling and for whom the association is marketing the milk, all as determined by the Market Administrator of the applicable federal milk order.

96. A cooperative marketing association which is qualified as such by the USDA is entitled to receive the order blend price for the milk only for those members of the cooperative association for whom the cooperative association is actually marketing the milk, as determined by the Market Administrator.

97. [Rejected][28]

98. Statistics are available from the Market Administrators of the several orders to show the number of producers and the pounds of milk pooled by a cooperative marketing association on a given order in a specific month.

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[28] The use of "[Rejected]" in regard to paragraph 97 above and in regard to many, many of the paragraphs of findings of fact proposed by NFO reflect an explicit finding and conclusion that NFO failed to prove the particular finding of fact proposed and that the weight of all the evidence adduced in the case is likewise insufficient to support the particular finding proposed by NFO.

While we have modified, and as modified have made many of the findings proposed, we have keyed our findings to the paragraph numbers of the findings proposed by the parties so that an appellate court will understand the significance of our use of "[Rejected]" in regard to a particular proposed finding.

In Phase I of this case we stated in some detail why particular paragraphs of findings proposed by Mid-Am in support of its claim against NFO were rejected. It must, however, be noted that in Phase I we were required to deal with only a total 239 paragraphs of proposed findings by Mid-Am and that we had the benefit of exemplary cooperation of the parties which produced a stipulation of 3,247 paragraphs of agreed facts. NFO's Phase I responses to Mid-Am's proposed findings further reduced the area of disputed fact.

In Phase II and in Phase III of this case we were required to consider literally thousands upon thousands of paragraphs of proposed findings of fact and to work with a record which shows that the parties were not as successful in reducing the area of disputed factual data either by stipulation or by their responses to proposed findings as they were in Phase I.

It is apparent that it simply was not practicable to spell out the rationale of our rejection of proposed findings in Phase II and Phase III in the same manner as we were able to do in Phase I. We would have liked to have been able to have done so for the benefit of any appellate court which may be required to review our findings of fact under Rule 52(a) but we believe that obvious limitations of time and the production of an even longer memorandum opinion made such a procedure impracticable for Phase II and Phase III.

J. Geographic Marketing Areas

99. A precise geographic area is established for regulation by the order and, although federal milk marketing orders vary in size, many orders include portions of two or more states.

100. The determination of the geographic marketing area to be covered by a federal order is based, but only in part, on the area in which handlers compete for sales of fluid products.

101. The determination of the geographic marketing area covered by a federal order is based, but again only in part, on the location of the producers. The location of the producers is not, however, particularly significant because producers in Wisconsin, for example, may be pooled in Federal Order markets located as far away as New Jersey and New York.

102. Because the expense of transporting fluid milk to a market is usually borne by the producer, the net price that he receives for his milk is affected by the distance and the price level of the market to which his milk is delivered.

103. [Rejected]

104. The evidence in the case establishes that general movement of milk is in a southerly direction from Minnesota and Wisconsin to federal order areas located to the south of those States.

105. [Rejected] 106. [Rejected] 107. [Rejected]

108. Some local health inspection laws, which did not accept reciprocal inspections, have acted as barriers to the movement of milk from producers located distant from the inspecting jurisdiction to handlers regulated by an order in the inspecting jurisdiction.

109. [Rejected]

110. Other things being equal, most fluid milk processors prefer to purchase locally produced milk.

111. Organizations of milk producers try to sell their milk to handlers for the highest possible price and at the lowest possible cost. Such organizations are not always able to do so.

112. Minimum Class I prices are different in each of the federal orders 30, 60, 61, 62, 64, 65, 68, 73, 106 and 126.

113. Blend prices may or may not vary among Federal Markets in general, and in each of Federal Orders 30, 60, 61, 62, 64, 65, 68, 73, 106 and 126 in particular.

114. [Rejected]

115. Producers or their marketing organizations compete for sales of milk to regulated handlers.

116. [Rejected] 117. [Rejected]

K. Cooperatives And Premiums

118. Because the milk production of individual dairy farms is small in relationship to the size of milk markets, the individual farmer has no market power and cannot affect the market price which is paid for the milk produced on his farm.

119. By functioning as a marketing agent for its members, a cooperative may be able to bargain with handlers for payment of prices in excess of the minimum federal order price.

120. The amount by which the cooperative-negotiated price exceeds the federal milk order minimum class prices paid by handlers to producers or associations of producers for milk sold to handlers is called a "premium."

121. Premiums negotiated by producer marketing associations are generally limited to milk disposed of for Class I uses and, when not so limited, are generally higher than those applied to milk disposed of for Class II uses.

122. A premium price may be eroded if other producers or associations of producers are willing to sell milk in the market at a lesser price.

123. Premium income is not a part of the federal milk market pool and is not computed into the blend price formula for the order.

124. Neither the obtainment nor the distribution of premium income is regulated by the federal milk marketing orders.

125. [Rejected]

126. The demand for fluid milk is relatively inelastic or unresponsive to changes in price.

127. Demand for Grade A milk to be used to make fluid milk products is relatively inelastic or unresponsive to changes in price.

III. Early Days Of The Alleged Conspiracy

A. The Formation, Scope And Purposes Of Associated Dairymen, Inc.

128. In the mid-1960's, increasing numbers of producers in Minnesota and Wisconsin were converting from Grade B to Grade A milk production.

129. In the mid-1960's, producers in the North who made expenditures for conversion to Grade A expected to receive higher prices for their milk.

130. In order to receive higher prices for their Grade A milk, northern producers have usually sought to have their milk associated with federal order markets and to receive federal order minimum prices.

131. The United States Supreme Court's *Lehigh Valley Coop.* v. *United States*, 370 U.S. 76 (1962), decision may have resulted in changes in various Market Order provisions and may have made it easier for Northern milk to become pooled on Midwestern federal orders.

132. Associated Dairymen, Inc. (ADI) was formed as a common marketing agency in 1964.

133. Among the cooperatives which joined ADI in 1964 were AMPI predecessors:

Central Arkansas Milk Producers Association
Central Oklahoma Milk Producers Association

Central West Texas Milk Producers Association
Madison Milk Producers Cooperative (Madison, Wisconsin)
Mid-Texas Milk Producers Association
North Texas Producers Association
Pure Milk Association (Chicago, Illinois)
Pure Milk Producers Association (Tulsa, Oklahoma)

and Mid-Am predecessors:

Des Moines Cooperative Dairy (Des Moines, Iowa)
Neosho Valley Cooperative Creamery Association (Erie, Kansas)
Nemaha Cooperative Creamery Association (Sabetha, Kansas)
Producers Creamery Company (Springfield, Missouri)
Pure Milk Producers Association (Kansas City, Missouri)
St. Joseph Milk Producers Association (St. Joseph, Missouri)
Sanitary Milk Producers (St. Louis, Missouri)
Shawnee County Milk Producers Association (Topeka, Kansas)
Sioux City (Iowa) Milk Producers Cooperative Association
Square Deal Milk Producers Association (Highland, Illinois)
Sunflower Dairy, Inc. (Valley Falls, Kansas)

134. Joining ADI sometime after June, 1964 were AMPI predecessors:

Pure Milk Products Cooperative (Fond du Lac, Wisconsin)
Mid-South Milk Producers Association (Memphis, Tennessee)
Cedar Valley Cooperative Milk Association (Waterloo, Iowa)
Producers Association of San Antonio (later known as South Central Texas Milk Producers Association)
Rochester Dairy Cooperative (Rochester, Minnesota)
Boyceville (Wisconsin) Farmers Cooperative Creamery Association
Five-Star Dairyland Cooperative (New Ulm, Minnesota)
Turtle Lake (Wisconsin) Cooperative Creamery Association

New Prague Dairy Products, Inc., (New Prague, Minnesota)

and Mid-Am predecessors:

Twin Cities Milk Producers Association (St. Paul, Minnesota)
Goodhue Cooperative Creamery Association (Goodhue, Minnesota)
St. Croix Valley Cooperative (Glenwood City, Wisconsin)
Lamar Creamery Company (Sulphur Springs, Texas)
North Star Dairy (St. Paul, Minnesota)
Bertha Cooperative Creamery Association (Bertha, Wisconsin)
Albert Lea Cooperative Creamery (Albert Lea, Minnesota)

135. [Rejected]

136. ADI functioned as a common marketing agency in Federal Orders which cover the geographic areas in which the Twin Cities, Des Moines, Eastern Iowa, Cedar Rapids, Iowa City, Omaha, Kansas City, Southern Illinois, St. Louis-Ozarks, Wichita, Neosho Valley, Oklahoma Metropolitan, Fort Smith, Central Arkansas, Memphis, North Texas, South Texas, Red River Valley, Central West Texas and Corpus Christi, respectively, were located. [This is not to be construed as a finding that those Federal Market Orders are "markets" within the meaning of the antitrust laws.]

137. The principal purpose of ADI was to get milk producers a higher price for their milk.

B. Mergers

138. ADI, from time to time, sought the advice of various agricultural economists, many of whom were professors at various land grant universities. Such a group, known as the Dairy Marketing Advisory Committee (DMAC) suggested courses of action for dairy farmers to follow.

139. Among other recommendations, DMAC recommended ADI member cooperatives to merge and thereby to achieve unity.

140. ADI, like NFO, encouraged dairy farmers to band together.

141. On July 1, 1967, the original or "first" Mid-America Dairymen, Inc. was formed by the consolidation or merger of:

Pure Milk Producers Association of Greater Kansas City
Shawnee County Milk Producers Association
Nemaha Cooperative Creamery Association
Bennett Creamery Company (Ottawa, Kansas)

142. Prior to July 1, 1968, Producers Creamery Company of Springfield, Missouri had consolidated with, merged with, or acquired the following organizations:

Neosho Valley Cooperative Creamery Association
Erie, Kansas
Des Moines Cooperative Dairy, Des Moines, Iowa
Lamar Creamery Company, Sulphur Springs, Texas

143. Prior to July 1, 1968, Square Deal Milk Producers, Highlands, Illinois, had merged with, consolidated with, or acquired Greene County Milk Producers, Springfield, Missouri.

144. On July 1, 1968 Mid-America Dairymen, Inc. of Springfield, Missouri, was formed by the merger, consolidation, or acquisition of:

Producers Creamery Company, Chillicothe, Missouri
Producers Creamery Company, Springfield, Missouri
Sanitary Milk Producers, St. Louis, Missouri
Square Deal Milk Producers, Highland, Illinois
Mid-America Dairymen, Inc., Kansas City, Missouri

145. During 1969, and on the dates indicated Mid-America Dairymen, Inc. merged with, acquired, or consolidated with, the following:

2/1/69	Harrison County Dairy Producers Association, Inc., Bethany, Missouri
3/1/69	Standard Milk Company, Aurora, Missouri
4/1/69	St. Joseph Milk Producers, St. Joseph, Missouri
4/1/69	Major Cheese Company, Ozark, Missouri
7/1/69	Sunflower Dairy, Inc., Valley Falls, Kansas

146. During 1970 and on the dates indicated, Mid-Am merged with, acquired, or consolidated with, the following:

4/1/70	Central States Dairy Cooperative, Omaha, Nebraska
4/1/70	Twin City Milk Producers Association, St. Paul, Minnesota
5/1/70	North Star Dairy, St. Paul, Minnesota
5/1/70	Pure Milk Products Company, Winstead, Minnesota
5/1/70	Wilsey-Bennett of Oklahoma, Inc., Oklahoma City, Oklahoma
7/1/70	Crofton Cooperative Creamery, Crofton, Nebraska
7/1/70	Red Oak Grove Cooperative Creamery Association, Austin, Minnesota
7/1/70	Welcome Creamery Company, Welcome, Minnesota
7/1/70	Hutchinson Creamery Association, Hutchinson, Minnesota
7/1/70	Tri-County Dairy Cooperative, Winthrop, Minnesota
7/1/70	North Star Dairy-Lakes Region, Fergus Falls, Minnesota
7/1/70	Zumbro Valley Dairy Association, Goodhue, Minnesota
8/1/70	Benson Cooperative Creamery, Benson, Minnesota
8/1/70	Bertha Cooperative Creamery, Bertha, Minnesota
8/1/70	West Side Cooperative Creamery Association, Little Falls, Minnesota
8/1/70	Essig Cooperative Dairy Association, Essig, Minnesota
8/1/70	Winthrop Cooperative Creamery Association, Winthrop, Minnesota
8/1/70	Whetstone Valley Dairy Producers, Twin Brooks, South Dakota
9/1/70	Northfair Dairy, Winthrop, Minnesota
9/1/70	Sigel Cooperative Creamery, New Ulm, Minnesota
9/1/70	Gaylord Cooperative Creamery Association, Gaylord, Minnesota
9/1/70	Farmers Cooperative Creamery Association, Lafayette, Minnesota

10/1/70 Klossner Cooperative Creamery Association, Klossner, Minnesota
11/1/70 Vining Cooperative Creamery Association, Vining, Minnesota
12/1/70 Dent Cooperative Creamery Association, Dent, Minnesota

147. Prior to its April, 1970 merger with Mid-Am, Twin Cities Milk Producers Association consolidated with, merged with, or acquired the following organizations:

St. Croix Valley Cooperative Dairies, Glenwood City, Wisconsin
Centra-Sota Dairy Association, Monticello, Minnesota [which had previously consolidated with, merged with, or acquired the following organizations:]
Buffalo Cooperative Creamery Association, Santiago, Minnesota
Farmers Cooperative Creamery Association, Sauk Rapids, Minnesota
Monticello Cooperative Association, Monticello, Minnesota

148. Prior to its April, 1970 merger with Mid-Am, Central States Dairy Cooperative had previously been formed by merger of:

Nebraska-Iowa Non-Stock Cooperative Milk Association [which had picked up Sioux City Milk Producers Association]
Farmers Union Cooperative creamery, Superior, Nebraska
Farmers Cooperative Creamery, Fullerton, Nebraska

149. Prior to its merger with Mid-Am, North Star Dairy-Lakes Region had previously consolidated with, merged with, or acquired the following organizations:

Fergus Falls Dairy, Fergus Falls, Minnesota
Lakes Dairy Cooperative, Detroit Lakes, Minnesota

150. Prior to its merger with Mid-Am, Red Oak Grove Cooperative Creamery Association had previously con-

solidated with, merged with or acquired the following organizations:

Albert Lea Cooperative Creamery Association
Albert Lea, Minnesota

151. During 1971, and on the dates indicated, Mid-Am acquired, merged with, or consolidated with the following:

1/1/71 St. James Creamery Association, St. James, Minnesota
1/1/71 Frazee Creamery Company, Frazee, Minnesota
1/1/71 Hawley Creamery Association, Hawley, Minnesota
2/1/71 Home Town Dairies, Inc., Iowa City, Iowa
4/1/71 Ulen Cooperative Creamery, Ulen, Minnesota
4/1/71 Ashby Cooperative Creamery Association, Ashby, Minnesota
4/1/71 Evansville Cooperative Creamery Association, Evansville, Minnesota
5/1/71 Elbow Lake Cooperative Creamery Association, Elbow Lake, Minnesota
5/1/71 Erhard Cooperative Creamery Company, Erhard, Minnesota
6/1/71 Battle Lake Cooperative Creamery Association, Battle Lake, Minnesota
10/1/71 Emma Creamery Company, Emma, Missouri

152. On September 1, 1976, MPI was formed by the merger, acquisition, or consolidation of:

Central Arkansas Milk Producers Association, Little Rock, Arkansas
Pure Milk Producers Association of Eastern Oklahoma, Tulsa, Oklahoma
South Texas Producers Association, Houston, Texas
North Texas Producers Association, Arlington, Texas
Mid-Tex Milk Producers Association, Austin, Texas

153. Between September, 1967 and prior to October 1, 1969, and on the indicated dates, MPI merged with, consolidated with, or acquired the following:

11/1/67 Central Oklahoma Milk Producers Association, Oklahoma City, Oklahoma
11/1/67 Southwest Dairymen, Inc., Wichita, Kansas

12/1/67 Central West Texas Milk Producers Association, Abilene, Texas
12/1/67 Gold Star Dairy, Mangum, Oklahoma
1/1/58 South Central Texas Milk Producers Association, San Antonio, Texas
1/1/68 Golden Spread Independent Dairymen's Association, Inc., Booker, Texas
4/1/68 Dairy Farmers Association, Inc., Albuquerque, New Mexico
4/1/68 Gold Spot Dairy, Inc., Enid, Oklahoma
9/1/68 Mid-South Milk Producers Association, Memphis, Tennessee
Spring, 1969 Jere Dairy, Grand Prairie, Texas
7/1/69 Five Star Dairyland Cooperative, Inc., New Ulm, Minnesota
8/1/69 South Shore Cooperative Creamery, South Shore, South Dakota
8/1/69 Minn Valley Milk, Belle Plaine, Minnesota
9/16/69 Washington County Cooperative Creamery Company, Linn, Kansas

154. During October and November, 1969 AMPI was formed by merger, consolidation, or acquisition of the following organizations on the indicated dates:

10/1/69 Boyceville Farmers Cooperative Creamery, Boyceville, Wisconsin
10/1/69 Milk Producers, Inc., San Antonio, Texas
10/1/69 Rochester Dairy Cooperative, Rochester, Minnesota
10/1/69 Turtle Lake Cooperative Creamery Association, Turtle Lake, Wisconsin
11/1/69 Albion Cooperative Creamery Company, Albion, Wisconsin
11/1/69 Antigo Milk Products Cooperative, Antigo, Wisconsin
11/1/69 Burlington Cooperative Pure Milk Association, Burlington, Wisconsin
11/1/69 Madison Milk Producers Cooperative Dairy, Madison, Wisconsin
11/1/69 Pure Milk Association. Chicago, Illinois

155. During 1969 and on the dates indicated, AMPI merged with, acquired, or consolidated with, the following:

10/1/69 Farmers Cooperative Creamery Association, Deer Creek, Minnesota
10/1/69 Farmers Cooperative Dairy Association, Howard Lake, Minnesota
10/15/69 Grey Eagle Cooperative Creamery Association, Grey Eagle, Minnesota
11/1/69 Delano Cooperative Creamery Association, Delano, Minnesota
12/1/69 Cedar Valley Cooperative Milk Association, Waterloo, Iowa
12/1/69 Farmers Dairy & Produce Cooperative, Freeman, South Dakota
12/1/69 Lafayette Cooperative Creamery, Lafayette, Wisconsin
12/1/69 Le Center Cooperative Creamery, Le Center, Minnesota
12/1/69 Ludington Cooperative Creamery Association, Fall Creek, Wisconsin
12/1/69 New Prague Dairy Products, Inc., New Prague, Minnesota
12/1/69 Osceola County Cooperative Creamery Association, Sibley, Iowa
12/1/69 Southern Dairy Association, Owatonna, Minnesota

156. During 1970, and on the dates indicated, AMPI merged with, consolidated with, or acquired the following:

1/1/70 Blakely Cooperative Creamery Association, Belle Plaine, Minnesota
1/1/70 Central Indiana Dairymen's Association, Indianapolis, Indiana
1/1/70 Farmers Cooperative Creamery, Hull, Iowa
1/1/70 O'Brien County Cooperative Creamery, Sanborn, Iowa
1/1/70 O'Brien-Osceola Cooperative Creameries, Odebolt, Iowa
1/1/70 Webster Cooperative Dairy Association, Webster, Minnesota
1/15/70 Arlington Cooperative Creamery Association, Arlington, Minnesota
2/1/70 Alamo Milk Producers, San Antonio, Texas

4/1/70 Farmers Cooperative Creamery Association, Pelican Rapids, Minnesota
4/1/70 Otisco Cooperative Creamery Association, Otisco, Minnesota
4/1/70 Stark-Sleepy Eye Farmers Creamery Association, Sleepy Eye, Minnesota
5/1/70 Audubon Cooperative Creamery Association, Audubon, Minnesota
5/1/70 Farmers Cooperative Creamery Association, Grasston, Minnesota
6/16/70 Hartland Creamery Association, Hartland, Minnesota
6/16/70 Range Cooperative Creamery Association, Amery, Wisconsin
7/1/70 Cornland Milk Products Cooperative, Lytton, Iowa
8/1/70 Pure-Vac Dairy Products Corporation, Memphis, Tennessee
9/1/70 Adams Cooperative Creamery Association, Adams, Minnesota
9/1/70 Twin Dairies Association of Courtland and Nicollet, Nicollet, Minnesota
10/1/70 Marathon-Clark Cooperative Dairy Association, Abbottsford, Wisconsin
11/25/70 Wilsey-Bennet (half interest from Mid-Am)

157. During 1971 and on the dates indicated, AMPI merged with, acquired, or consolidated with the following:

1/1/71 Maquoketa Valley Cooperative, Arlington, Iowa
1/14/71 Kenosha Milk Producers Cooperative, Inc., Kenosha, Wisconsin
2/1/71 Rushford Cooperative Creamery Association, Rushford, Wisconsin
4/1/71 Brownsdale Creamery Association, Brownsdale, Minnesota
5/1/71 Plainview Farmers Cooperative Creamery, Plainview, Nebraska
5/1/71 Pure Milk Products Cooperative, Fond du Lac, Wisconsin
9/1/71 Buffalo Center Cooperative Creamery Association, Buffalo Center, Iowa
9/1/71 Humboldt Cooperative Creamery Association, Humboldt, Iowa
9/1/71 Tri-County Cooperative Drying Association, Whittemore, Iowa

11/1/71 Western Wisconsin Dairies Cooperative, Blair, Wisconsin

Percentages Of Milk Pooled by AMPI and Mid-Am On Various Federal Orders

158-167. [NFO based the group of findings proposed in its paragraphs 158-167 on NFO Exh. 860, an exhibit not designated in accordance with Pre-Trial Order No. 12. That exhibit, however, purports to set forth data compiled by the USDA. NFO described NFO Exh. 860 as "merely a demonstrative exhibit computing what percentages of the total milk pooled on each federal order was pooled by AMPI and Mid-Am." Because we do not consider that the data contained in NFO Exh. 860 adds any substantial weight to NFO's proof, we set forth some of the data from that exhibit in our findings as stated in paragraphs 158 to 167. As was true in regard to our finding in paragraph 136 above, our findings in paragraphs 158 to 167 are not to be construed as findings that the various Market Orders referred to are "markets" within the meaning of the antitrust laws.]

158. From 1969 to 1975, AMPI pooled the following percentages of milk pooled on Order 30:

1969	25%
1970	26%
1971	50%
1972	49%
1973	46%
1974	44%
1975	41%

159. From 1969 to 1974, Mid-Am pooled the following percentages of the total milk pooled on Order 60:

1969	0%
1970	5%
1971	17%
1972	25%
1973	28%
1974	31%
1975	29%

160. From 1969 to 1975, AMPI and Mid-Am pooled the following percentages of the total milk pooled on Order 61:

	AMPI %	Mid-Am %
1969	15	0
1970	48	6
1971	52	13
1972	65	11
1973	67	11
1974	81	10
1975	97	0

161. From 1969 to 1975, AMPI and Mid-Am pooled the following percentages of the total milk pooled on Order 62:

	Mid-Am %	AMPI %
1969	93	1
1970	91	1
1971	94	1
1972	92	0
1973	92	0
1974	88	0
1975	88	0

162. From 1969 to 1975, AMPI and Mid-Am pooled the following percentages of the total milk pooled on Order 64:

	AMPI %	Mid-Am %
1969	2	82
1970	2	86
1971	2	84
1972	2	82
1973	1	80
1974	1	79
1975	4	76

163. From 1969 to 1975, AMPI and Mid-Am pooled the following percentages of the total milk pooled on Order 65:

	AMPI %	Mid-Am %
1969	0	0
1970	15	81
1971	16	82
1972	19	80
1973	23	76
1974	27	72
1975	29	67

164. From 1969 to 1975, AMPI and Mid-Am pooled the following percentages of the total milk pooled on Order 68:

	AMPI %	Mid-Am %
1969	0	0
1970	1	59
1971	2	54
1972	1	48
1973	1	42
1974	2	36
1975	4	30

165. From 1969 to 1975, AMPI and Mid-Am pooled the following percentages of the total milk pooled on Order 73:

	AMPI %	Mid-Am %
1969	96	0
1970	98	0
1971	97	0
1972	96	0
1973	85	10
1974	69	27
1975	70	26

166. From 1969 to 1975, AMPI and Mid-Am pooled the following percentages of the total milk pooled on Order 106:

	AMPI %	Mid-Am %
1969	88	0
1970	87	1
1971	91	2
1972	93	2
1973	80	6
1974	89	5
1975	88	0

167. From 1969 to 1975, AMPI and Mid-Am pooled the following percentages of the total milk pooled on Order 126:

	AMPI %	Mid-Am %
1969	69	11
1970	66	9
1971	61	8
1972	58	9
1973	61	10
1974	68	7
1975	71	5

168. [Rejected] 168 (a). [Rejected] 169. [Rejected]

170. [Rejected] 171. [Rejected]

172. [Rejected] 173. [Rejected]

C. ADI Establishes A Standby Pool

174. ADI established a standby pool on September 1, 1967.

175. On September 1, 1967, 50 cents per cwt. Class I premiums were established by ADI member cooperatives throughout most of the Midwest.

176. [Rejected]

177. The ADI standby pool was established to provide an adequate supply of milk for deficient markets and to permit suppliers of that milk to share in the Class I sales of the market.

178. ADI executed standby pool contracts with various milk plants in Minnesota and Wisconsin, which gave ADI an exclusive option to purchase all milk handled by those plants and required the plants to use any milk not purchased by ADI to make manufactured products.

179. Many of the standby pool plants may have had milk associated with the Chicago order at some time prior to their joining the ADI standby pool.

180. Sanna, Inc. (Menominee, Wisconsin), a subsidiary and later a division of Beatrice Foods Company, and Falls Dairy (Jim Falls, Wisconsin), two of the original signatory ADI standby pool plants, were proprietaries.

181. [Rejected] 182. [Rejected] 183. [Rejected]

184. As ADI general manager Harold Nelson reported at a March 18, 1966 ADI committee meeting, a time prior to the formation of CMPC, AMPI, Mid-Am and ARSPC, it was "necessary to establish some sort of standby pool, with payments from Southern markets in order that the increased Chicago Class I price will not result in drowning of the Chicago market with added milk now in unregulated plants."

185. All those in attendance at the March 18, 1966 ADI Committee meeting, called for the purpose of discussing action necessary for USDA to adopt a Class I price of $5.30 in Chicago, agreed, among other things, that ADI should "start now in Grade A milk only in standby pool" and should "deduct from all orders amount necessary to pay Chicago blend at location to standby plants." It is further agreed that a delegation would confer with "U.S. authorities" in Washington the following Tuesday, March 22, 1966.

186. [Rejected] 187. [Rejected]

188. Federated Dairy Cooperative (Federated), a common marketing agency for Chicago Order 30, was formed in 1959 by about 20 cooperatives, including Pure Milk Association (PMA), AMPI's principal predecessor in Order 30.

189. In 1966, Outagamie, Hillpoint, Columbus, Alto and Lake-to-Lake cooperatives, which were supplying Wanzer Dairy in Chicago, formed Chicagoland Dairy Sales, Inc. (Chicagoland).

190. The Chicago Market Order was terminated by the Secretary of Agriculture in early 1966 because producers representing at least 66⅔% of the total producers failed to approve amendments proposed for that Market Order.

191. After the Chicago Market Order was voted out, Chicagoland joined with others in the formation of Central Milk Sales Agency (CMSA) in 1967.

192. CMSA supported the ADI standby pool from September, 1967 on.

193. [Rejected]

194. CMPC, after it was organized, supported the standby pool.

195. CMPC contributed to the standby pool even though it was not a member.

196. [Rejected]

197. Every member of Associated Milk Dealers, Inc. (AMDI), an association comprising nearly all Chicago area milk bottlers, was a proprietary.

198. The following proprietaries were members of AMDI:

Country's Delight Milk Products, Inc.
(a subsidiary of Certified Grocers, Inc.)
Borden, Inc.
Hawthorn-Mellody, Inc.
Dean Foods Company
Meadowmoor Dairy, Inc.

199. [Rejected] 200. [Rejected] 201. [Rejected]

202. [Rejected] 203. [Rejected] 204. [Rejected]

205. [Rejected] 206. [Rejected] 207. [Rejected]

208. [Rejected] 209. [Rejected] 210. [Rejected]

211. ARSPC was formed on March 31, 1970 as a new cooperative whose sole function was to operate a standby pool.

212. ARSPC held its first meeting in St. Louis on April 16, 1970, and Joe Westwater was named general manager.

213. Of the 46 ARSPC directors, eleven were dairy farmer members of AMPI, six were dairy farmer members of Mid-Am, and six were dairy farmer members of DI.

214. Robert Alexander, a dairy farmer member of Mid-Am, became president of ARSPC.

215. Elbrege Sullivan and Avery Vose, who were also dairy farmer members of AMPI, became first vice-president and treasurer, respectively, of ARSPC.

216. The minutes of the organization meeting of ARSPC show that only two dairy farmer members of AMPI and only two dairy farmer members of Mid-Am were named to the original nine member executive committee of ARSPC.

217. J. Moser, a farmer member of DI, held one position on ARSPC's executive committee.

218. The minutes of the April 16, 1970 ARSPC Executive Committee meeting showed that Hanman and Wosje were named as members of ARSPC's twelve-man Operating Committee.

219. McWilliams (or Cope), Andy Anderson (AMPI North) and Keiffer Howard (or Joe Murphy) were also named on ARSPC's Operating Committee.

220. Morgan, Frank McDowell and Ross Buckley were also named as members of ARSPC's Operating Committee.

221. The organization meeting of ARSPC voted to approve and adopt a committee recommendation "that the Board now continue the 1-1/4 cent cwt. payment on Class I sales." The ARSPC Board, at a meeting immediately following the Organization Meeting, adopted a resolution which provided that "ARSPC collect the assessments on April milk sales of contributing members and commence payment to Standby Pool plants for milk receipts in May under contracts to be effective May 1st."

222. ARSPC used employees of AMPI's Chicago office as the milk routing agent of members of ARSPC.

223. [Rejected] 224. [Rejected] 225. [Rejected]

226. ARSPC was the successor to the ADI standby pool operation.

227. [Rejected] 228. [Rejected]

229. By fall, 1970 ARSPC increased its Class I assessment rate from 1-1/4 cents per cwt. to 2-1/4 cents per cwt.

230. [Rejected] 231. [Rejected]

232. During the years 1972 through 1974, the volume of Grade A milk eligible for fluid use which was delivered to plants and dealers in Wisconsin, Minnesota, and Iowa, excluding deliveries to handlers regulated under federal market orders, was as follows:

(In Million Pounds)

	Wisc.	Minn.	Iowa	Total
1972	1,090.3	566.3	0	1,656.6
1973	947.0	289.4	178.5	1,414.9
1974	1,213.0	141.4	0	1,354.5

233. During the years 1972 through 1974, ARSPC shipped the following amount of milk from standby pool plants to out-of-area plants:

	(In Million Pounds)
1972	126.3
1973	233.8
1974	82.2

234. [Rejected]

235. During the years 1972 through 1974, the net volume of milk in the ARSPC standby pool was as follows:

	(In Million Pounds)
1972	1,376.1
1973	1,490.5
1974	1,304.1

236. [Rejected] 237. [Rejected]

D. AMPI/Mid-Am Alleged Agreements Not to Compete

238. [Rejected] 239. [Rejected] 240. [Rejected]

241. [Rejected] 242. [Rejected] 243. [Rejected]

244. [Rejected] 245. [Rejected] 246. [Rejected]

247. [Rejected] 248. [Rejected] 249. [Rejected]

250. [Rejected] 251. [Rejected] 252. [Rejected]

253. AMPI became a member of Mid-Am.

254. Mid-Am became a member of AMPI.

255. In June, 1970, AMPI and Mid-Am executed consignment agreements for marketing their respective members' milk as a common marketing agency in the Oklahoma Metropolitan, South Texas, Central Arkansas, and Wichita Federal

Orders. AMPI Exh. 4546 establishes that a similar agreement was at one time executed in 1970 in regard to the North Texas Federal Order.

256. In June, 1970, pursuant to those agreements and common market agency, Mid-Am consigned some of its members' milk to AMPI for sale in the Oklahoma Metropolitan, North Texas, South Texas, Central Arkansas and Wichita Federal Order markets.

257. Mid-Am and AMPI entered into the consignment agreement covering the Wichita market in June, 1970 because there was a possibility that Mid-Am was going to begin making sales in Wichita.

258. In July or August, 1970, AMPI and Mid-Am extend their common marketing agency by executing consignment agreements covering the St. Louis-Ozarks, Nebraska-Western Iowa, Des Moines, Kansas City, Neosho Valley and Twin Cities Federal Order markets.

259. In January, 1971 under a similar arrangement, Mid-Am consigned some of its members' milk to AMPI for sale in Dairyland Order 61.

260. In April, 1971, and in a similar manner, Mid-Am consigned some of its members' milk to AMPI for sale in Oklahoma Order 106.

261. The Mid-Am/AMPI common market agency and their consignment agreements were actually implemented, with Mid-Am marketing AMPI milk in some areas and AMPI marketing Mid-Am milk in others.

262. Pursuant to a Mid-Am/AMPI common market agency and the applicable consignment agreement, Mid-Am offered to supply Grade A milk to Page Milk Company at Coffeyville, Kansas, and AMPI offered to supply Grade A milk to Page's Tulsa, Oklahoma plant.

263. [Rejected] 264. [Rejected]

265. The AMPI/Mid-Am consignment agreements referred to ARSPC in a "Whereas" clause which, in general, called upon the Association and Association member to give "uniform support" to ARSPC.

266. It was ARSPC's cooperative policy to sell Reserve Pool milk only to participating member cooperatives.

267. [Rejected] 268. [Rejected] 269. [Rejected]

270. [Rejected] 271. [Rejected] 272. [Rejected]

273. AMPI and Mid-Am entered into a common marketing agency and activated a consignment agreement in the Nebraska-Western Iowa Order.

274. Mid-Am and AMPI agreed to allow the Order 65 Market Administrator to release to each of them the other's statistical data concerning pounds of milk pooled on the Order.

275. Beginning in 1970, and continuing until 1974, the Order 65 Market Administrator released AMPI's statistical data to Mid-Am and Mid-Am's to AMPI.

276. [Rejected] 277. [Rejected]

278. [Rejected] 279. [Rejected]

280. In 1971 Mid-Am, AMPI, and eight other dairy cooperatives were members of the M-W Association, a common marketing agency which announced prices for the sale of M-W Association members' milk to handlers regulated by Twin Cities Order 68.

281. [Rejected] 282. [Rejected]

E. Additional Merger Data

283. [Rejected]

284. As of April, 1969, it had been "the expressed goal of Associated Dairymen, Inc., for several years to have all dairy farmers (in the Mississippi Valley) in one organization."

285. [Rejected] 286. [Rejected]

287. In November, 1969, Alamo Milk Producers Association (Alamo) requested that Mid-Am merge with Alamo.

288. [Rejected]

289. Mid-Am refused to merge with Alamo.

290. AMPI merged with Alamo on February 1, 1970.

291. [Rejected]

292. As early as 1969, AMPI and Mid-Am discussed merger developments in Minnesota and Wisconsin.

293. The document which circulated the plan and agreement of the merger of Mid-Am, CSDC, and Twin City for approval (NFO Exh. 203, p. 31) stated that "the quickened pace of developments within the dairy industry necessitates prompt and immediate restructuring of the coops throughout the Midwest."

294. [Rejected] 295. [Rejected] 296. [Rejected]

297. [Rejected] 298. [Rejected]

F. CACF

299. AMPI, Mid-Am, and DI decided to form a common marketing association to be known as Central American Cooperation Federation (CACF) in late 1970.

300. CACF, with AMPI, Mid-Am and DI as incorporators and members, was incorporated in Kentucky in February, 1971.

301. AMPI, Mid-Am and DI were the only members of CACF at the time of incorporation.

302. [Rejected] 303. [Rejected]

G. Some Alleged Early Efforts Allegedly To Eliminate Outsiders

1. ADI Allegedly Tackles The Iowa Non-Member Problem

304. [Rejected]

305. In late 1967 there were substantial numbers of independent milk producers in Iowa.

306. In November, 1967 ADI attempted to encourage those independent producers to join a cooperative.

307. [Rejected] 308. [Rejected] 309. [Rejected]

310. [Rejected] 311. [Rejected] 312. [Rejected]

313. On February 1, 1971, Mid-Am acquired Home Town Dairies.

314. After Mid-Am acquired Home Town, some of the independent farmers who had been shipping to Home Town became members of Mid-Am.

2. Mid-Am Allegedly Helps To Plug Rat Holes In MPI Territory

315. [Rejected] 316. [Rejected] 317. [Rejected]

318. [Rejected] 319. [Rejected] 320. [Rejected]

321. [Rejected] 322. [Rejected] 323. [Rejected]

324. [Rejected] 325. [Rejected] 326. [Rejected]

3. ADI Standby Pool Allegedly Works To Protect Mid-Am Premium

327. Hiland Dairy of Springfield, Missouri, obtained 100 percent of its supplies from Mid-Am after July 1, 1968.

328. In the late fall of 1969, Mid-Am instituted a Class I price increase of milk sold to Hiland Dairy.

329. Hiland Dairy objected to this Mid-Am price increase.

330. When Hiland refused to accept the price increase, Mid-Am refused to supply Hiland.

331. When Mid-Am refused to supply Hiland at Christmas, 1969, Hiland attempted to obtain milk from other sources.

332. [Rejected] 333. [Rejected

334. [Rejected] 335. [Rejected]

336. Foremost at Springfield also objected to the Mid-Am premium in December, 1969 and attempted to obtain alternative supplies.

337. [Rejected] 338. [Rejected]

339., No standby pool milk has ever been shipped to Missouri.

340. [Rejected]

IV. NFO's Alleged Capability In Dairy

A. NFO Formation And Purpose

341. NFO was organized in 1955 as a farm protest group.

342. NFO is a membership organization.

343. By 1958, NFO members decided that NFO should start collective bargaining for all major farm commodities.

B. NFO's Recruiting Efforts

345. Once NFO decided in 1958 to alter its purpose and start bargaining instead of protesting, NFO began soliciting dairy, meat and grain farmers and other persons to sign the NFO membership agreement.

346. [Rejected] 347. [Rejected]

348. From 1958 to 1965, NFO's primary activity was soliciting farmers to join NFO.

349. [Rejected] 350. [Rejected]

351. NFO is the only farm organization in the United States that markets milk, meat and grain.

352. [Rejected]

353. NFO at some times and in some places discussed its cull-cow program when it attempted to enlist dairy farmers to market milk through NFO.

354. [Rejected]

C. NFO Membership Structure

355. NFO is subdivided into (1) state organizations, (2) congressional district organizations; and (3) county organizations.

356. NFO claimed to have state, congressional district and county organizations in Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, Oklahoma, Texas and Wisconsin by at least 1969.

357. NFO claimed at the time of trial to have about 1,500 county organizations in 45 states but did not offer any documentary evidence to support its claim.

358. [Rejected]

359. The NFO county organizations were supposed to work directly with the NFO commodity departments.

360. Some of the NFO county organizations had separate county bargaining committees for dairy, meat and grain.

361. Some NFO county organizations held monthly meetings.

362. NFO employees appear at some county meetings from time to time and explain NFO commodity programs to farmers.

363. NFO county organizations were supposed to aid NFO employees in soliciting new production and new members.

364. Non-members of NFO are invited to and do attend some NFO county meetings.

D. NFO Marketing Structure

365. NFO now has commodity departments for dairy, meat, grain and specialties.

366. [Rejected]

367. NFO has had Meat, Grain, Specialty, Field Staff, and Public Information Departments since at least 1967.

368. The NFO Field Staff Department (1) recruits new members and (2) collects dues.

369. NFO also has an Accounting Department.

370. [Rejected] 371. [Rejected] 372. [Rejected]

373. [Rejected] 374. [Rejected]

375. [Rejected] 376. [Rejected]

E. Master Contracts

377. NFO developed master contracts for dairy, grain, cattle and hogs in about 1961.

378. In dairy, NFO had two types of master contracts—one for Grade A milk and one for manufacturing grade milk.

379. From about 1963 to 1967, NFO signed some milk processors up to NFO master contracts. The NFO Master Contract, however, was never activated.

380. [Rejected]

381. NFO interested a number of Midwestern dairy farmers in its master contract program.

F. The Holding Action

382. In late 1966, the NFO members voted to stage a milk holding action.

383. Prior to 1966, NFO had organized and staged holding actions in hogs, cattle and grain.

384. In March, 1967, NFO organized and staged a milk holding action which lasted about two weeks.

385. NFO's holding actions, insofar as they demonstrated the ability of NFO to influence farmers to hold their products for a higher price and to control the supply of farm commodities reaching the market, tended to strengthen the organization's position in collective bargaining.

386. An unidentified number of Midwestern dairy farmers supported the 1967 NFO milk holding action.

G. NFO Revamps Dairy Department

387. Ed Graf has been director of NFO's Dairy Department since 1968.

388. NFO hired Avila and Berkhahn as assistant directors of the NFO Dairy Department in 1968 and Scott in 1969.

389. The focus of the NFO dairy program in 1968 and 1969 was on the heavy dairy producing states in the Midwest: Wisconsin, Minnesota and Missouri.

390. NFO may have organized some Kansas and Nebraska dairy farmers as early as 1969.

391. In 1968 and 1969, an unidentified number of farmers turned out for NFO organizational meetings in the heavy dairy producing areas in Minnesota, Wisconsin and Missouri.

392. [Rejected]

H. Supply Contracts

393. NFO began soliciting processors to sign NFO milk supply contracts in about 1969.

394. [Rejected]

395. NFO offered these milk supply contracts to processors in the Midwest, principally in Minnesota and Wisconsin.

396. [Rejected]

397. Many NFO members moved their milk to plants which signed NFO milk supply contracts.

398. [Rejected]

399. The Dairy Marketing Advisory Committee (DMAC) was a group of agricultural economists from land grant colleges and representatives from the producer segment of the milk industry, including MPI/AMPI and Mid-Am, initially organized by Associated Dairymen, Inc. (ADI).

400. DMAC and MPI officials participated in "Think Tank" meetings from time to time.

401. A DMAC-MPI Think Tank memorandum stated in July, 1969 that NFO's propaganda had both an intellectual and emotional appeal to farmers.

402. The same DMAC-MPI Think Tank memorandum stated the view of its unknown authors that "[t] disenchantment with General farm organizations and dairy cooperatives created a vacuum for occupancy by NFO."

403. The unidentified author of the DMAC-MPI Think Tank document further stated vaguely that "NFO packed enough upper Midwest dairy coop boards to get some managers fired, to make others lose their health, and to scare all the rest of them."

404. The DMAC-MPI Think Tank document expressed an opinion that NFO had gained support from a substantial [but unidentified] number of farmers who were larger, younger and better educated than the average farmer.

405. The same DMAC-MPI Think Tank document expressed an opinion that NFO's strength was to be found in its "membership relations and communciations" and in "the Intellectual fabric upon which their membership was built." The document also expressed an opinion that "NFO is clever in taking credit for what is good, and letting others take the blame for what is bad."

406. [Rejected] 407. [Rejected]

I. NFO Decides To Enter Direct Marketing Of Milk

408. [Rejected]

409. In 1968, NFO first applied to the USDA for qualification as a handler under federal milk marketing orders.

410. In 1969, NFO began making plans for the direct marketing of Grade A milk,

411. Because NFO relies heavily on volunteer help provided by its members, NFO decided to meet with and ask those members whether they wanted NFO to market Grade A milk.

412. By 1969 some NFO dairy farmer members had indicated substantial interest in NFO's marketing their Grade A milk.

413. By mid-1969 a number of NFO Grade A dairy farmer members were on established NFO hauling routes in southeastern Wisconsin.

414. [Rejected]

415. Because NFO dairy farmer members in southwest Missouri and Wisconsin expressed the most interest in having NFO market their milk, NFO decided to start a Grade A marketing program in those two spots.

416. NFO Dairy Department employees began their attempt to find markets for Grade A milk and for the locaton of reloads and various NFO members began organizing milk on truck routes and helping to establish the reloads.

J. NFO Allegedly Calls Upon Experience Marketing Hogs, Cattle, Grain

417. [Rejected] 418. [Rejected] 419. [Rejected]

420. [Rejected] 421. [Rejected] 422. [Rejected]

K. NFO Milk Allegedly Attractive To Handlers

423. [Rejected]

424. In May, 1970 some NFO members were selling Grade A milk in Chicago at prices below the AMPI price and this cheaper price appealed to some bottling handlers.

425. [Rejected] 426. [Rejected]

427. One handler testified at trial that he preferred to have at least two different raw milk suppliers.

428. Mid-Am at one time owned bottling plants at Iowa City, Iowa (Home Town), and Minneapolis, Minnesota (Nicollet).

429. As of 1970, AMPI had bottling plants at Enid, Oklahoma (Gold Spot) and Hillsboro, Kansas (Tip Top).

430. Land O'Lakes, Inc. (LOL), a large Minnesota cooperative, at one time had bottling plants at Cedar Rapids, Iowa (Sanitary Farms) and St. Paul, Minnesota (Sanitary Farms).

431. [Rejected] 432. [Rejected]

433. NFO has never operated a bottling plant.

434. When attempting to sell milk to bottlers, NFO emphasizes that it does not compete with them.

435. [Rejected]

L. NFO Focuses Grade A Dairy Program In Midwest

436. [Rejected] 437. [Rejected]

438. After starting out in southwest Missouri and Wisconsin, NFO hoped to expand its Grade A milk marketing program into Minnesota, Iowa, Illinois, Kansas and Nebraska as soon as it found buyers there.

439. [Rejected]

440. NFO hoped that its Grade A milk marketing program would spread from southwest Missouri and Wisconsin through the Midwest within about six months.

441. NFO established milk reloads in southwest Missouri and Wisconsin in 1969.

442. [Rejected] 443. [Rejected]

M. NFO Allegedly Preaches Gospel To Non-Members

444. In its attempt to develop a dairy program in Missouri, Wisconsin and Minnesota, NFO held dairy meetings which were attended by non-members and those non-members were urged to join NFO and to participate in its dairy program.

445. Some non-members joined NFO and some shipped through NFO's dairy program in 1970 and 1971.

N. Interest In NFO Grade A Milk Marketing Allegedly Grows

446. After NFO opened its three Missouri reloads in 1970 and early 1971, an unidentified number of central and southwest Missouri Grade A dairy farmers expressed interest in marketing their milk through NFO.

447. [Rejected] 448. [Rejected] 449. [Rejected]

450. Approximately 20 per cent of AMPI's Tri-State, later Mid-States, Region producers were NFO members.

451. [Rejected]

452. [Omitted by NFO]

453. As of October, 1970, Mid-Am regarding NFO as a competitor in the raw milk supply business.

454. Mid-Am official Hanman expressed an opinion that NFO had a cost advantage over Mid-Am and other Midwest dairy cooperatives in the sense of not having to pay for the full service operations of a traditional dairy cooperative.

455. As of October, 1970, Mid-Am viewed NFO as a substantial threat to Mid-Am's maintenance of its membership.

456. [Rejected]

O. NFO's Claims Regarding "Poisoning NFO's Well And Trying To Get It To Join The Club"

457. On March 27, 1970, John C. Gage, counsel for Mid-Am, wrote the Director of the Dairy Division of USDA complaining that NFO was marketing Missouri milk in alleged violation of Mid-Am membership agreements by selling milk to an Oklahoma bottler regulated under the North Texas Order.

458. John Gage, counsel for Mid-Am, asked the USDA not to recognize NFO as a qualified handler under federal orders because NFO was not, in his opinion, a cooperative.

459. John Gage, counsel for Mid-Am, sent copies of his March 21, 1970 letter to the USDA to AMPI's manager and to its attorney.

460. In July, 1970, counel for Mid-Am, AMPI and DI presented a legal argument to the Director of the Dairy Division of USDA in an effort to see that NFO was not qualified as a handler under federal milk marketing orders.

461. In 1970, Berde informed the USDA that CMPC also opposed NFO's federal order qualification.

462. In 1970 CMPC invited NFO to join CMPC.

463. [Rejected] 464. [Rejected]

465. In December, 1970, Mid-Am, AMPI, CMPA, PMPC and DI jointly proposed an amendment to the definition of "cooperative association" in all federal milk marketing orders.

466. The purpose of Mid-Am's, AMPI's, DI's and CMPC's approaches to the USDA was to foreclose NFO from the marketing of Grade A milk under Federal Orders as a qualified cooperative.

467. [Rejected]

P. Conclusion

468. [Rejected]

V. The Southwest

A. Texas

1. AMPI's Alleged Control Of The Texas Markets

469. Until the merger of the Texas federal milk marketing orders in 1975, the following federal milk marketing orders were in Texas: Lubbock-Plainview Order 120, South Texas Order 121 (Houston area), North Texas Order 126 (Dallas-Fort

Worth area), San Antonio Order 127, Central West Texas Order 128, Austin-Waco Order 129, Corpus Christi Order 130, and Texas Panhandle Order 132.

470. In 1967, several Texas cooperatives consolidated with others to form MPI. [See finding 152, above].

471. [Rejected] 472. [Rejected]

473-480. [NFO based this group of findings proposed in its paragraphs 473-480, inclusive, on NFO Exh. 860. Our comment on NFO Exh. 860 as it appears in connection with the NFO findings proposed in its paragraphs 158 to 167 is applicable here. Although NFO's findings as proposed in its paragraphs 473-480 do not state exactly the data contained on NFO Exh. 860, we shall set forth the findings as proposed by NFO with the caveat that we do not consider the data is either relevant or material and because, in any event, we do not believe that such data adds any substantial weight to NFO's proof.]

473. From 1969 to 1975, AMPI pooled about 94 per cent of all milk pooled on Order 120.

474. From 1969 to 1975, AMPI pooled about 73 percent of all milk pooled on Order 121.

475. From 1969 to 1975, AMPI pooled about 65 per cent of all milk pooled on Order 126. [See finding 167, *supra*]

476. From 1969 to 1975, AMPI pooled about 88 per cent of all milk pooled on Order 127.

477. From 1969 to 1975, AMPI pooled about 95 per cent of all milk pooled on Order 128.

478. From 1969 to 1975, AMPI pooled about 98 per cent of all milk pooled on Order 129.

479. From 1969 to 1975, AMPI pooled about 62 per cent of all milk pooled on Order 130.

480. From 1969 to 1975, AMPI pooled about 100 per cent of all milk pooled on Order 132.

481. [Rejected]

482. From 1969 through 1975, about nine per cent of all milk pooled on North Texas Order 126 was Mid-Am member milk. [See comment on NFO Exh. 860 at 473-480 above, and see finding 167, *supra*]

2. Mid-Am/AMPI Alleged Agreements Not To Compete

483. [Rejected] 484. [Rejected]

485. Mid-Am and MPI, later AMPI, had Class I base plans in effect with Texas members from 1968 until at least 1972.

486. In Mid-1970, Mid-Am and AMPI formed common market agencies for consignment of the milk of their members to be shipped into the South Texas and North Texas federal order markets

487. [Rejected] 488. [Rejected]

3. The Alleged Non-Member Problem In Texas

489. As early as 1968, and at other times before NFO moved any milk to Texas, MPI, later AMPI, was selling 50 cent premium milk to handlers while other groups of producers were selling for less.

490. [Rejected]

491. Alamo Milk Producers (Alamo), Independent Dairymen's Cooperative (IDC) and Marketing Assistance Plan (MAP) were among those selling milk to handlers in Texas in competition with MPI and later AMPI.

492. In 1968, Alamo was the supplier of some milk to the Carnation Company (Carnation) plant at San Antonio, Texas.

493. A Carnation inter-office memorandum dated August 16, 1968 stated that Carnation officials were aware that MPI was "naturally disturbed over the fact that we [Carnation] are now bringing Iowa milk down into San Antonio and that the Alamo Milk Producers Cooperative is also supplying San Antonio."

494. Carnation continued to buy milk for its San Antonio plant from Alamo into 1969.

495. Foremost Foods Company (Foremost) at Dallas, Texas began to buy some milk from Alamo in March or April, 1969.

496. This Alamo milk purchased by Foremost at Dallas beginning in March or April, 1969 displaced MPI milk.

497. In early 1969, Foremost was concerned that, if it bought non-MPI milk, MPI might not service the Foremost account as well as it had in the past.

498. Schepps Dairy began buying milk from Alamo and IDC in 1969 and consequently cut back on its purchases from MPI.

499. Other Texas handlers—Beatrice and Borden—complained to MPI, later AMPI, about having to pay a fifty cent premium while competing handlers were not.

500. By early 1969, all cooperatives and other milk suppliers were well aware of the competition problems in Texas.

4. AMPI/Mid-Am Alleged Solutions For The Alleged Non-Member Problem

(a). The Alleged Planning Stage

i). Generally

501. [Rejected] 502. [Rejected] 503. [Rejected]

ii). Alleged Cut-Offs

504. On June 7, 1969 MPI Marketing Specialist Joe Murphey wrote a memorandum to MPI North Texas Division manager J. G. Anderson on the subject: "Possible solution to receipt of non-member milk at certain Dallas plants."

505. The possible solution proposed by Murphey in June, 1969 was that MPI, after flush production season ended in July or August, "not have milk available to supply the full demand

placed upon us by Schepps and Foremost and that over a period of time we continue to gradually shorten their supply." There is no evidence that anyone acted on the recommendation proposed by Murphey.

506. [Rejected]

iii). Alleged Competing with Handlers

507. [Rejected]

iv). Alleged Pool Loading

508. [Rejected] 509. [Rejected] 510. [Rejected]

511. [Rejected] 512. [Rejected]

513. The July 11, 1969 minutes of an MPI committee meeting stated that Mid-Am had lost a total of 40 of its Texas producers.

514. The July 11, 1969 document stated that MPI had lost several members to retirement and to IDC and MAP and that MPI had lost a considerable amount of milk sales to Schepps to IDC and Alamo.

515. At the July 11, 1969 committee meeting MPI delegated Tom Townsend to work with Bill Bakeslee of Mid-Am in "their efforts to qualify three million pounds of milk in the Mid-American area for shipment into MPI short markets this fall and winter."

516. An August, 1969 memorandum indicated that Mid-Am had agreed to make two to three million pounds of milk per month available "to meet Fall shortages in MPI."

v). Base Plans

517. Base plans were conceived and developed in the operation of ADI.

518. Effective August 1, 1968 MPI established a Class I base plan.

519. The MPI Class I base plan in essence allocated all MPI Class I sales on a particular federal order among MPI Grade A

farmers on that order in proportion to their historical production and provided that the farmers be paid more for their base milk than for their excess milk.

520. MPI base became a transferable and salable asset.

521. An MPI farmer selling his MPI base had to agree not to produce Grade A milk for Class I sales in any MPI market for five years.

522. After consolidating, AMPI had a Class I base plan in its MPI Region.

523. AMPI's Class I base plan provided that an AMPI farmer who sold his base had to agree not to produce and offer for sale milk for human consumption in fluid form in the MPI area for five years, until that period was shortened by the final judgment and decree entered by this Court in *United States* v. *AMPI*, April 31, 1975.

524. Mid-Am established a Class I base plan as amended October 1, 1968, for its members whose milk was pooled on the North Texas and Neosho Valley Orders.

525. The Mid-Am Class I base plan in essence allocated all Mid-Am Class I sales in a particular federal order among all Mid-Am Grade A farmers whose milk was pooled on that order in proportion to their historical production and provided that the farmers be paid no more for their base milk than their excess milk.

526. A Mid-Am base became a transferable and saleable asset.

527. As of September, 1968, Mid-Am required a member who sold all of his base to agree not to produce and offer Grade A fluid milk for sale in the Neosho Valley, Ozarks, St. Louis, Kansas City, Wichita or Tulsa markets.

528. Mid-Am continued its Class I base in effect for its Sulphur Springs, Texas and Neosho Valley, Kansas producers until at least 1971.

529. As of late 1971, a Mid-Am North Texas producer selling all of his base agree not to produce an offer for sale for five years milk for human consumption in fluid form on the North Texas, South Texas, Austin-Waco, Central West Texas, Red River Valley, Northern Louisiana, Central Arkansas or Fort Smith markets.

530. As of late 1971, a Mid-Am produce in the Erie, Kansas area selling all his base agreed not to produce and offer for sale for five years milk for human consumption in fluid form on the Neosho Valley, South Texas, North Texas, St. Louis-Ozarks, Kansas City, Wichita or Oklahoma Metropolitan markets.

531. [Rejected]

532. The July 11, 1969 meetingof MPI's Marketing Committee considered a suggestion that the North Texas and perhaps the South Texas and San Antonio federal orders be amended to include a seasonal base plan.

533. The minutes of that July 11, 1969 meeting showed that "it was the unanimous consensus of the group that a seasonal base plan might make the competitive situation even more intense."

b). The Alleged Implementation Stage

i). The Buying and Closing of Jere Dairy

534. In spring, 1969, MPI merged or consolidated with Jere Dairy of Grand Prarie, Texas.

535. [Rejected] 536. [Rejected]

ii). The Alleged Cutting Off Carnation

537. From at least 1965 to June, 1968, Carnation Company bought some milk for its Sulphur Springs, Texas evaporated milk plant from MPI or its predecessors.

538. In June, 1968, Carnation Sulphur Springs bought 838,609 pounds of milk from Alamo and 121,970 pounds of milk from North Texas Producers Association, of its total purchases of 3,143,569 pounds of milk that month.

539. [Rejected]

540. In the 1968-1969 period, Carnation Company had milk bottling plants at San Antonio, Houston, and Wichita Falls, Texas and at Tulsa, Oklahoma.

541. [Rejected]

542. MPI shipped no milk at all to Carnation's Sulphur Springs, Texas plant from June, 1968 through October, 1969.

543. [Rejected]

544. On October 16, 1969, Carnation signed an agreement with MPI (AMPI).

545. [Rejected] 546. [Rejected]

iii). Alleged Shorting of Foremost

547. In early December, 1969, Foremost considered increasing its purchases of milk from Alamo from its San Antonio plant.

548. [Rejected] 549. [Rejected] 550. [Rejected]

551. [Rejected] 552. [Rejected]

iv). Competing with Schepps

553. AMPI's Vandervoorts' bottling operation competed with Schepps Dairy, a proprietary bottling plant, in the Dallas-Fort Worth market.

554. [Rejected] 555. [Rejected]

556. [Rejected] 557. [Rejected]

558. In early 1970, AMPI sold its Vandervoorts plant to Kroger Company.

v). Alleged Pool Loading in San Antonio

559. Prior to January, 1970, AMPI pooled milk on the San Antonio federal order market.

560. In fall 1969 and early 1970, Mid-Am made milk available to MPI (AMPI) and some of it was shipped into Texas.

561. [Rejected]

562. In November, 1969, Alamo's president appeared before Mid-Am's Board of Directors and discussed whether Mid-Am and Alamo should merge.

563. [Rejected]

c). Alamo and IDC Fold

564. [Rejected]

565. Mid-Am did not merge with Alamo.

566. AMPI merged with Alamo on February 1, 1970.

567. [Rejected] 568. [Rejected]

5. The Alleged New Non-Member Problem In Texas

569. By early 1970, MAP had increased its membership in Texas.

570. In March, 1979 MAP agreed to supply Schepps with its full requirements of raw milk.

571. [Rejected] 572. [Rejected] 573. [Rejected]

574. [Rejected] 575. [Rejected] 576. [Rejected]

577. [Rejected]

6. Continued Efforts Allegedly To Eliminate Other Non-Members In Texas

578. [Rejected] 579. [Rejected] 580. [Rejected]

581. [Rejected] 582. [Rejected] 583. [Rejected]

584. [Rejected] 585. [Rejected] 586. [Rejected]

7. The Beatrice, Forth Worth Incident

587. NFO sold some of its members' Missouri Grade A milk to Beatrice Foods Company at Forth Worth, Texas, from July, 1970 through March, 1971.

588. Beatrice, Forth Worth, notified NFO to discontinue all milk shipments from Springfield, Missouri supply plant effective 12:01 a.m., March 26, 1971, for reasons stated in a letter dated March 24, 1971.

8. Alleged Long Run Effect Of Losing Beatrice

589. NFO did not thereafter make any substantial sales of its members' milk to Texas handlers until spring, 1973, when it began marketing the milk of some Texas NFO members to Borden at Dallas.

590. [Rejected]

9. Base Plans Allegedly Inhibited NFO's Growth In Texas

591. [Rejected]

10. Recent AMPI Alleged Full-Supply Tactics

592. [Rejected] 593. [Rejected] 594. [Rejected]

595. [Rejected] 596. [Rejected]

11. Conclusions

597. [Rejected] 598. [Rejected] 599. [Rejected]

600. [Rejected]

B. Oklahoma

1. AMPI Control

601. Oklahoma had two federal milk marketing orders: Oklahoma Metropolitan Order 106, which encompassed the cities of Tulsa and Oklahoma, among other places; and Red River Valley Order 104, which straddled Texas and Oklahoma.

602. One Oklahoma cooperative was a part of the original formation of MPI and two other Oklahoma cooperatives became a part of MPI in 1967.

603. [Rejected] 604. [Rejected]

605. [See finding 166, *supra*]

606. In every year from 1969 to 1975, AMPI pooled at least 75 per cent of all milk pooled on Order 104. [But see note in re: findings 473-480, *supra*]

2. The Alleged "Non-Member Problem" in Oklahoma

607. In September, 1967 several Oklahoma bottling plants were buying some or all their milk from independent producers.

608. By September, 1967 Beatrice at Tulsa agreed to buy milk from MPI.

609. [Rejected] 610. [Rejected]

611. As early as 1967, Carnation Company's milk bottling plants at Tulsa, Oklahoma and Wichita Falls, Texas, were buying milk from independent farmers.

612. [Rejected]

613. Colvert's Dairy at Ardmore, Oklahoma, also was buying milk from independent producers.

614. Gold Spot Dairy, Inc., an operating cooperative at Enid, Oklahoma, was buying from its own producer members.

615. Beatrice and other handlers competing with Carnation in Oklahoma complained to AMPI about paying the 50 cent premium while Carnation was buying non-premium milk.

616. [Rejected]

3. Early Efforts By MPI Allegedly To Eliminate The Non-Members

a). Alleged 1967 Pressure Pooling

617. The Oklahoma Metropolitan Order 106 Market Administrator had information on September 1, 1967 that MPI intended to pool milk on the Oklahoma Order.

618. In fall, 1967, MPI pooled excess milk on the Oklahoma Order and several Texas Orders.

619. [Rejected]

620. Gold Spot merged with or was acquired by MPI in April, 1968.

b). MPI Alleged Refusal To Deal With Carnation At Sulphur Springs

621. [See finding 537, *supra*.]

622. [Rejected] 623. [Rejected] 624. [Rejected]

625. [Rejected] 626. [Rejected] 627. [Rejected]

4. Mid-Am Alleged Knowledge Of The Carnation "Non-Member Problem"

628. [Rejected] 629. [Rejected] 630. [Rejected]

631. [Rejected] 632. [Rejected] 633. [Rejected]

5. NFO Arrives On The Scene

634. In February, 1970, Midwest Creamery at Ponca City, Oklahoma, began buying milk from NFO Missouri producers.

635. Midwest Creamery was a milk bottling plant which, from July, 1970 on, was regulated by the Oklahoma Metropolitan Order.

636. As early as March, 1970, both AMPI and Mid-Am had knowledge of NFO's marketing Missouri milk to Midwest Creamery.

637. By May, 1970, Beatrice had told NFO that it was looking for milk to supply its Tulsa and Oklahoma City plants.

6. AMPI Allegedly Plans To Straighten Out The Tulsa Market

638. [Rejected] 639. [Rejected] 640. [Rejected]

641. [Rejected] 642. [Rejected]

643. Keiffer Howard was an employee of AMPI at least during the period 1970 through February, 1972.

644. During the period 1970 through February, 1972, Keiffer Howard was the AMPI employee in charge of milk movements in AMPI's Southern or MPI Region, which encompassed Texas and Oklahoma among other states.

645. [Rejected] 646. [Rejected] 647. [Rejected]

7. AMPI And Mid-Am Allegedly Begin Loading The Oklahoma Pool

648. In the fall of 1970, someone from AMPI called Mid-Am and asked whether Mid-Am had milk available to ship to Oklahoma.

649. [Rejected]

650. A June 5, 1970 USDA memorandum stated that Mid-Am had consigned Mid-Am Nebraska milk to AMPI for pooling on the Oklahoma Order.

651. On June 1, 1970, Mid-Am and AMPI executed a consignment agreement in regard to milk to be pooled on Oklahoma Order 106.

652. AMPI pooled some Mid-Am consigned milk on the Oklahoma order.

653. The Nebraska-Western Iowa Order 65 Market Administrator, in a June 5, 1970 memorandum to USDA in Washington, discussed the pooling of Mid-Am Central States Division milk on Oklahoma Order 106.

654. That report said that unidentified "local representatives" of Mid-Am Central States Division had said to him that they did not feel that the pooling of Mid-Am Central States milk on Oklahoma Order 106 in summer 1970 was good marketing.

655. Beginning in June, 1970, AMPI pooled quantities of AMPI Iowa milk on the Oklahoma Order.

656. AMPI's Sibley, Iowa milk was pooled on the Oklahoma Order at a loss each month.

657. An Assistant Secretary of USDA expressed his opinion in a June 8, 1970 memorandum that the goal AMPI and Mid-Am had in their pooling activity on "Texas and Oklahoma Orders" was "to increase the spread between member and non-member prices, forcing these producers to join MPI or handlers of their milk to increase their pay prices; and thereby reinforce their ability to exact substantial premiums on Class I milk." There is no evidence that anyone agreed with that opinion.

8. AMPI Attempts To Buy Midwest, Two Other Plants Allegedly To Save The 50 Cent Premium

658. [Rejected] 659. [Rejected] 660. [Rejected]

661. [Rejected] 662. [Rejected] 663. [Rejected]

664. [Rejected] 665. [Rejected] 666. [Rejected]

667. [Rejected]

9. AMPI Allegedly Offers A Carrot To Carnation

668. [Rejected] 669. [Rejected]

10. ARSPC Allegedly Gets Involved In The Pool Loading

670. In September, 1970, Mid-Am ceased pooling any of its Central States Division member's milk on Oklahoma Order 106 pursuant to its common marketing arrangement with AMPI because a shortage of milk required that the milk be delivered to Order 65 plants.

671. Gary Hanman of Mid-Am once proposed that ARSPC members who pool reserve supply milk be allowed to retain "reserve supply" status for that milk as a means to increase financial support of the pool.

672. [Rejected] 673. [Rejected]

674. On August 31, 1970, Joseph Westwater, general manager of ARSPC, announced a meeting of ARSPC's Operations

Committee to consider a proposal that ARSPC members who desired to associate with a Federal Order milk that is under option, be able to do so and still retain standby pool status and receive the standby pool payment for that milk.

675. According to Westwater, under this technique of pooling standby pool milk on federal order markets, non-member producers would help defray some of the cost of standby pool operations.

676. [Rejected]

677. [See finding 674, *supra*.]

678. At a September 11, 1970 meeting, the ARSPC Operations Committee approved submission of the proposal to the full ARSPC Board.

679. [Rejected]

680. On October 19, 1970, the ARSPC Board approved the proposal to permit pooling of standby pool milk on federal order markets and appointed a special committee, which included Westwater of ARSPC, Hanman and Gage of Mid-Am and Russell and Murphey of AMPI, to implement it.

681. [Rejected] 682. [Rejected]

683. [Rejected] 684. [Rejected]

685. Milk from standby pool plants in Minnesota and Wisconsin was pooled by AMPI on the Oklahoma Metropolitan Order each month from October, 1970 to the end of January, 1972.

686. [Rejected] 687. [Rejected] 688. [Rejected]

689. [Rejected] 690. [Rejected] 691. [Rejected]

692. [Rejected] 693. [Rejected] 694. [Rejected]

695. No mention of a report by Howard appears in the minutes of a December, 1970 AMPI Board meeting.

696. [Rejected] 697 [Rejected]

698. In February, 1971, ARSPC general manager Westwater reminded AMPI official Joe Murphey that he had been delegated the responsibility of writing up a justification for pooling milk of the Oklahoma Federal market.

699. [Rejected] 700. [Rejected] 701. [Rejected]

702. [Rejected] 703. [Rejected]

11. AMPI Allegedly Acquires Then Sells Gilt Edge

704. [Rejected] 705. [Rejected] 706. [Rejected]

707. [Rejected] 708. [Rejected]

12. AMPI Allegedly Sells At Below Cost To Wrest A Military Contract Away From Carnation

709. [Rejected] 710. [Rejected] 711. [Rejected]

712. [Rejected] 713. [Rejected] 714. [Rejected]

715. [Rejected]

13. AMPI's Gold Spot Division Competes With Carnation In Oklahoma

716. [Rejected] 717. [Rejected] 718. [Rejected]

719. [Rejected] 720. [Rejected] 721. [Rejected]

722. [Rejected]

14. AMPI Acquires Then Allegedly Uses Pure-Vac To Solve Market Problems With Customers Including Carnation

723. In 1970, AMPI acquired Pure-Vac Dairy Products Corporation, an ice cream processor in Memphis, Tennessee.

724. [Rejected]

725. [Rejected]

726. After AMPI acquired Pure-Vac, Ed Charlton, manager of the Pure-Vac plant, reported to Richard McDougal, AMPI's Director of Fluid Milk Marketing.

727. [Rejected]

728. Pure-Vac was not a profitable operation for AMPI.

729. In April, 1971, Pure-Vac began selling ice cream products to Hale-Halsell, a wholesale grocery concern with a warehouse in Tulsa, Oklahoma.

730. Pure-Vac operation solicited the business of ice cream customers in Tulsa, Oklahoma, in April, 1971.

731. [Rejected]

732. AMPI's Gold Spot competed with Beatrice, Carnation, Page and others for sales of fluid milk and ice cream in Tulsa, Oklahoma.

733. [Rejected] 734. [Rejected] 735. [Rejected]

736. [Rejected] 737. [Rejected]

15. Pressure Pooling Allegedly Persists

738. [Rejected] 739. [Rejected] 740. [Rejected]

16. Carnation Allegedly Surrenders

741. [Rejected]

742. W. J. Moore of Carnation Company suggested to the Market Administrators of Oklahoma Order 106 and Red River Valley Order 104 that those two orders should be merged.

743. [Rejected]

744. Carnation Company believed that AMPI was interested in getting the Carnation non-member producers to join AMPI.

745. In early 1971, Carnation Company acquired a new customer in Texas and needed substantial additional raw milk to supply that customer.

746. Carnation believed that AMPI was its only practicable source of substantial additional milk to supply this new customer in Texas.

747. Carnation met with AMPI officials Byford Bain and Harold Nelson on or about March 8, 1971 to talk about the additional milk it needed.

748. [Rejected] 749. [Rejected] 750. [Rejected]

751. [Rejected] 752. [Rejected] 753. [Rejected]

754. [Rejected] 755. [Rejected]

756. By early June, 1971, AMPI had signed up all but about 12 to 14 of the approximately 160 non-member producers who had been shipping to Carnation at Tulsa and gave each an AMPI base under the "base plan."

757. AMPI official S. F. Howe stated in a company memorandum dated June 3, 1971 that AMPI producer unrest over AMPI's giving base to the former Carnation non-members should be viewed as "a small price to pay for the solutuion to this problem."

758. In July, 1971 AMPI agreed to supply Carnation's Sulphur Springs, Texas plant with some of its requirements of raw milk.

759. [Rejected]

17. Alleged Effects of Pressure Tactics On NFO

760. On only one or two occasions in the fall of 1970 did NFO make any effort to sell milk in Tulsa.

761. [Rejected]

762. Beatrice - Tulsa talked with NFO in late 1970 or early 1971 about buying milk from NFO but NFO did not have any Texas inspected milk available for sale to Beatrice - Tulsa at that time.

763. [Rejected] 764. [Rejected] 765. [Rejected]

766. [Rejected] 767. [Rejected] 768. [Rejected]

769. [Rejected] 770. [Rejected] 771. [Rejected]

772. [Rejected]

773. At times during 1971, NFO supplied Midwest Creamery with Wisconsin milk pooled on Order 30.

774. At times in late 1970 and in 1971 NFO supplied Midwest Creamery with Missouri milk pooled on Order 106.

775. [Rejected] 776. [Rejected]

777. NFO became a qualified cooperative on Order 106 effective May 1, 1971.

778. AMPI pooled some milk on Oklahoma Order 106 from May, 1971 to the end of January, 1972.

779. In 1971, the USDA suspended the pooling provisions of Oklahoma Order 106 and Red River Valley Order 104.

780. AMPI ceased pooling out-of-order milk on Order 106 February, 1972 after changes were made in the diversion provisions of Oklahoma Order 106.

781. [Rejected] 782. [Rejected]

783. In spring, 1971, NFO was contacted by a group of about 20 Oklahoma dairy farmers who had been selling as independents to Carnation at Tulsa.

784. These Oklahoma producers were concerned that they would no longer be able to ship to Carnation as independents.

785. [Rejected] 786. [Rejected]

787. NFO never marketed the milk of these former Carnation Tulsa producers.

788. [Rejected]

18. AMPI Base Plan Allegedly Inhibited NFO Growth In Oklahoma

789. MPI, later AMPI, had a Class I base plan with its Grade A members in Oklahoma.

790. In summer 1970, about 14 NFO Oklahoma farmers, some of whom were then shipping through AMPI, approached NFO about marketing their milk.

791. [Rejected] 792. [Rejected] 793. [Rejected]

794. In late 1971, some northeastern Oklahoma farmers shipped some milk through NFO for a short period of time.

19. Recent AMPI Full-Supply Alleged Tactics

795. [Rejected]

20. Conclusions

796. [Rejected] 797. [Rejected] 798. [Rejected]

799. [Rejected] 800. [Rejected] 801. [Rejected]

C. Missouri

1. Mid-Am Missouri Mergers

802. The original Mid-America Dairymen, Inc. was formed on July 1, 1967 by consolidation or merger of four cooperatives.

803. On July 1, 1968, the current Mid-America Dairymen, Inc. was formed by merger of Mid-Am of Kansas City with Producers Creamery Company of Chillicothe, Missouri; Producers Creamery Company of Springfield, Missouri; Sanitary Milk Producers of St. Louis, Missouri; and Square Deal Milk Producers of Highland, Illinois.

804. Prior to July 1, 1968 Producers Creamery of Springfield, Sanitary and Square Deal competed for farmer-members and sales accounts in the Order 62 area of central and southern Missouri and southern Illinois.

805. [Rejected] 806. [Rejected]

807. In January, 1969, Mid-Am had actual competing milk marketers in parts of Missouri.

808. [Rejected] 809. [Rejected]

810. On February 1, 1969, Harrison County [Cooperative] was acquired by Mid-Am.

811. On April 1, 1969, St. Joseph [Milk Producers Cooperative, St. Joseph, Missouri] was acquired by Mid-Am.

812. On July 1, 1969, Sunflower Dairy [Inc., Valley Falls, Kansas] was acquired by Mid-Am.

813. [Rejected] 814. [Rejected] 815. [Rejected]

816. On March 1, 1969, Mid-Am purchased the Standard Milk Company of Aurora, Missouri.

817. On April 1, 1969, Mid-Am purchased the Major Cheese Company of Ozark, Missouri.

818. [Rejected] 819. [Rejected]

820. [Rejected] 821. [Rejected]

822. On October 1, 1971, Mid-Am purchased the Emma Creamery Company, an Emma, Missouri manufacturing plant.

2. The Missouri Markets In 1970

823. Order 62 in 1970 encompassed St. Louis and its Missouri suburbs and certain Illinois suburbs and the southwestern Missouri area of Springfield and surrounding counties and northeastern Arkansas, including Fayetteville. [Neither this finding nor the finding in paragraph 824 to follow are to be construed as findings that either of the geographical areas described are "markets" for antitrust purposes.]

824. Order 64 in 1970 encompassed the Greater Kansas City and St. Joseph, Missouri areas.

825. Southwest Missouri is a surplus milk production area, and is referred to by some persons in the industry as "Little Wisconsin."

826. [Rejected] 827. [Rejected]

828. [Rejected] 829. [Rejected]

830. In 1970 there were only three distributing plant (Class I) handlers in the southern portion of Order 62 — Hiland and Foremost in Springfield and College Club in Fayetteville, — and all were supplied exclusively by Mid-Am.

831. [Rejected]

832. [See finding 161, *supra*.]

833. [See finding 161, *supra*.]

834. [See finding 162, *supra*.]

835. [See finding 162, *supra*.]

836. [Rejected]

3. NFO Missouri Membership Base

837. NFO had a cull cow program in Missouri prior to 1970.

838. There were a number of dairy farmers in southwest Missouri.

839. Some dairy farmers in southwest Missouri were NFO members.

840. In the late 1960's in southern Missouri, NFO had some county chapters, some of which held monthly meetings.

841. Non-members of NFO may have attended some monthly NFO county meetings in Missouri in the late 1960's.

842. NFO had somewhere between 25 and 120 dairy farmer members in Wright County, Missouri, in 1968-70. An accurate list of members was not adduced in evidence.

843. [Rejected]

844. NFO had a number of dairy farmer members in the Mountain Grove area in 1969-70.

845. [Rejected]

4. NFO's Entry Into Milk Marketing In Missouri

846. In late 1969 or early 1970 NFO started a Grade A dairy program in central and southwest Missouri.

847. In about January or February of 1970, NFO began moving producer milk to Midwest Creamery, Ponca City, Oklahoma, from the reloads established by NFO at Mountain Grove and Jefferson City, Missouri.

848. [Rejected]

849. Some of those producers had formerly been delivering their milk to Mid-Am.

850. Prior to NFO's entry into Grade A marketing in Missouri in 1970, some of the Grade A milk producers in southern Missouri had no practicable alternative other than to ship through Mid-Am.

851. [Rejected]

852. In 1969 some NFO members in southwest and central Missouri were interested in having NFO market their milk.

853. In 1969, both employees and members of NFO helped to set up a dairy program in central and southwest Missouri.

854. The NFO dairy farmer members in central and southwest Missouri complained to NFO in 1969 about the price of milk.

855. In 1969 and 1970, NFO had four employees who worked daily in central and southwest Missouri contacting both members and non-members of NFO in an attempt to get them to ship milk through NFO.

856. NFO member Ted Forbes attempted to recruit non-NFO members.

857. After the Mountain Grove reload opened, the NFO Dairy Bargaining Committee in Wright County, Missouri, was active in contacting producers to ship through the reload.

858. NFO's first Class I outlet for producers milk from central and southwest Missouri was Midwest Creamery (Midwest) at Ponca City, Oklahoma.

859. Beginning in February and continuing until the summer of 1970, NFO marketed what one witness estimated to be

one to one and one-half million pounds of the milk of central and southwest Missouri producers per month to Midwest.

860. From February until June, 1970, Midwest was regulated by North Texas Order 126.

861. In mid-1970, there were a number of producers shipping through NFO's Mountain Grove reload.

862. Later in 1970, the number of producers at Mountain Grove may have increased to some extent.

863. From summer 1970 on, Midwest Creamery was regulated by Oklahoma Order 106.

864. NFO could not pool the milk from Missouri producers until qualified to do so by USDA. After that USDA qualification was obtained, NFO was able to pool milk shipped to Midwest on North Texas Order 126.

865. [Rejected]

866. [Rejected]

5. Alleged Response To The Midwest Marketing

867. Both Mid-Am and AMPI were concerned about NFO's milk program and their officials discussed that concern.

868. In March, 1970, counsel for Mid-Am wrote a letter to the USDA Dairy Division about NFO's marketing Missouri farmers' milk to Midwest and asked the USDA not to recognize NFO as a qualified cooperative.

869. Copies of Mid-Am's letter to the USDA were sent to Nelson and Russell at AMPI.

870. [Rejected] 871. [Rejected]

872. [Rejected] 873. [Rejected]

6. Alleged Attempts To Develop Other Markets For Missouri Milk

874. On January 29, 1970, the Mid-Am St. Louis Division

Board of Directors received a report on NFO activity in Missouri.

875. It was the feeling of the Mid-Am St. Louis Division Board that handlers should be reminded that regular customers would receive priority on available supplies of milk.

876. [Rejected]

877. There has never been a shortage of milk for Class I use in southwest Missouri.

878. Early in 1970, NFO made repeated offers to supply Hiland and Foremost in Springfield with milk at prices below Mid-Am's.

879. In about mid-1970, Hiland Dairy bought several spot loads of NFO milk for Class II uses.

880. [Rejected] 881. [Rejected] 882. [Rejected]

883. In June, 1970 the mid-Am Board adopted a new pricing program.

884. Hiland was informed that its price from Mid-Am would be raised if any rearrangent of hauling routes was required.

885. [Rejected] 886. [Rejected]

887. [Rejected] 888. [Rejected]

889. In about summer, 1970, Putman of Hiland at Springfield, Missouri, told Hanman of Mid-Am that NFO had offered Hiland milk at a price lower than Mid-Am's.

890. Putman of Hiland asked Mid-Am to reduce its price to meet the NFO price and told Mid-Am that even it met NFO's price, Hiland still might buy some NFO milk.

891. Mid-Am reduced its price but Hiland still bought some milk through NFO.

892. [Rejected] 893. [Rejected] 894. [Rejected]

895. [Rejected] 896. [Rejected] 897. [Rejected]

898. [Rejected] 899. [Rejected] 900. [Rejected]

901. [Rejected] 902. [Rejected] 903. [Rejected]

904. In summer 1970, NFO offered to sell Missouri milk to Foremost at Springfield, Missouri, and/or Dallas, Texas.

905. Foremost refused to buy NFO milk at Springfield or Dallas in 1970.

906. NFO in 1969 and 1970 made some contact with the following Order 62 handlers about selling them NFO milk; Kroger, Sealtest, Pevely, and Quality in St. Louis; Hiland and Foremost in Springfield; and College Club in Fayetteville, Arkansas.

907. [Rejected] 908. [Rejected]

7. The Beatrice - Fort Worth Market

909. In July, 1970, NFO obtained a second Class I market for its Missouri members' milk at the Beatrice Foods plant in Fort Worth, Texas.

910. The Beatrice plant in Forth Worth was a subsidiary of Beatrice Foods, Inc., known as Boswell Dairy, Inc., and traded under the Beatrice "Meadow Gold" Label.

911. Beatrice Fort Worth had for the months January, 1970 through April 1970, inclusive, purchased 100 percent of its supply for AMPI.

912. In March, 1970, Beatrice Fort Worth was dissatisfied with payment of a 50 cent Class I premium and a Class II premium when certain of its competitors such as Midwest Creamery and Carnation at Tulsa had cheaper sources of supply.

913. In March, 1970 Beatrice was also displeased at AMPI's sale of eggnog from its Vandervoorts' plant in Dallas during Christmas, 1969.

914. On May 7, 1970 Beatrice Fort Worth officials met with AMPI officials in regard to producer milk problems.

915. [Rejected]

916. At a May 7, 1970 meeting, Beatrice agreed not to purchase from sources other than AMPI until AMPI had a chance to explain its plans for assuring Beatrice "equity."

917. Prior to May 7, 1970, NFO had met with Beatrice and offered Beatrice a supply of some milk for its Tulsa, Oklahoma and Fort Worth, Texas plants.

918. In 1970 Beatrice was also buying some of its requirements of milk from AMPI for its Tulsa, Oklahoma plant.

919. On July 7, 1970, Beatrice and AMPI officials again met to discuss the raw milk supply situation in Oklahoma and Texas.

920. [Rejected] 921. [Rejected] 922. [Rejected]

923. [Rejected] 924. [Rejected]

925. Beatrice Tulsa complained to AMPI in December, 1970 that AMPI's Gold Spot division was constantly causing Beatrice to lower its product prices and that Beatrice resented very much paying AMPI a premium for raw milk when faced with such competition.

926. [Rejected] 927. [Rejected] 928. [Rejected]

929. Beatrice Fort Worth paid the NFO Custodial Account a 40 cent premium on some Class I milk of NFO's Missouri producers.

930. During some months in 1970, AMPI was charging Beatrice Fort Worth a Class I premium averaging about 50 cents and a Class II premium of about 10 cents.

931. Beatrice Fort Worth's purchases of NFO milk increased from 990,632 pounds in July, 1970 to 2,209,832 pounds during February, 1971. Beatrice Fort Worth purchased an additional 1,073,880 pounds of raw milk from the operator of the NFO Springfield Receiving Station as bulk milk in the month of February, 1971.

932. [Rejected] 933. [Rejected] 934. [Rejected]

8. Alleged Bad Faith Use Of Membership Contracts

935. [Rejected]

936. In and after August, 1970, members of NFO began readying a facility in Springfield, Missouri, for use as a milk reload.

937. [Rejected] 938. [Rejected]

939. Mid-Am refused to divulge contract termination dates to Reid Heathman on March 22, 1971.

940. After the filing of this lawsuit, Mid-Am refused to honor any termination notices from members known to be related to NFO activities.

941. At a Board meeting on January 29, 1970, Mid-Am allowed a producer named Lyman Creed to transfer membership from Mid-Am to Prairie Farms Dairy, Inc., in the southern Illinois area.

942. Mid-Am refused to honor some producers' termination requests made by known NFO members after litigation between the parties was commenced.

943. [Rejected] 944. [Rejected] 945. [Rejected]

946. Mid-Am had continued in force the membership agreements signed by dairy farmers with some of its predecessor organizations, including Square Deal Milk Producers Association.

947. Beginning in late 1970, Meinerz Creamery in Iowa solicited Mid-Am members to terminate or breach their contracts with Mid-Am.

948. As of late 1970 Prairie Farms Dairy was soliciting Mid-Am members to breach their contracts with Mid-Am.

949. Mid-Am never sued Meinerz Creamery nor Prairie Farms for soliciting Mid-Am members to breach their contracts with Mid-Am.

950. [Rejected] 951. [Rejected]

9. Springfield Plant And Billy Stacey

952. [Rejected]

953. Al Scott asked Billy Stacey, an NFO member from Elkland, Missouri, to lease the Springfield facility on behalf of NFO.

954. In July, 1970, Stacey was a dairy farmer, shipping through Mid-Am, and also a contract hauler for Mid-Am.

955. In July through August, 1970, Billy Stacey was attempting to sell his hauling route.

956. Stacey had been hauling milk in southwest Missouri since about 1962.

957. [Rejected] 958. [Rejected] 959. [Rejected]

960. [Rejected] 961. [Rejected]

962. Effective September 1, 1970 Stacey was terminated as a Mid-Am trucker because of his activities in helping to establish an NFO Springfield reload.

963. [Rejected]

10. The Mid-Am Beatrice Initiative

964. In the fall of 1970, NFO increased shipments to Beatrice Fort Worth.

965. In October, 1970, Mid-Am and NFO officials met in John Gage's office in Kansas City in an unsuccessful effort to work out mutually agreeable milk marketing arrangements.

966. At some time in late 1970, Beatrice reported to Mid-Am that it could get milk cheaper from NFO.

967. After the October 2, 1970 meeting and before Mid-Am filed suit against NFO, Mid-Am learned that NFO was going to enter the Twin Cities market order.

968. The alarming thing to Mid-Am about NFO's activity in the fall of 1970 was that it was increasing, being stepped up and, from Mid-Am's viewpoint, "becoming progressively worse with intense solicitation."

968A. [Rejected] 969. [Rejected]

970. In late 1970 or early 1971, Mid-Am instructed its attorney Gage to advise Beatrice Fort Worth of Mid-Am's claim that NFO was illegally marketing the milk of some producers who were, according to Mid-Am's claim, legally obligated to market through Mid-Am.

971. [Rejected] 972. [Rejected]

973. In January, 1971, NFO began operations at its Springfield, Missouri reload.

974. In December, 1970, the Market Administrator for the North Texas Federal Order 126 advised AMPI, MAP and Mid-Am that, in cases that involved dual cooperative membership, the Market Administrator would resolve for order purposes on the basis of which cooperative was actually marketing the producer's milk.

975. Mid-Am attorney Gage was informed of this policy.

976. [Rejected]

977. In the fall of 1970, NFO again requested that the USDA approve NFO as a qualified Marketing Association of Federal Orders 106 and 126. The USDA was advised that the milk would be shipped through the Mountain Grove and Jefferson City reloads in Missouri.

978. On February 5, 1971, John Gage flew to confer with Beatrice Fort Worth plant manager Palitti about Beatrice's purchasing NFO milk from Missouri.

979. Gage followed up his February 5, 1971 meeting with a letter on February 15, 1971 to Palitti, with a copy to Dunham, the North Texas Market Administrator.

980. Gage, on February 5, 1971, had telephoned Dunham that he was going to Fort Worth to meet with Palitti.

981. Gage, in his February 15, 1971 letter to Beatrice Fort Worth, demanded that Beatrice pay Mid-Am for the milk of any Missouri producer who Mid-Am claimed had breached Mid-Am contracts.

982. [Rejected]

983. Gage advised Beatrice that Mid-Am would take legal action against any party who might act "in violation of Mid-America Dairymen's rights."

984. On February 17, 1971 NFO sent Beatrice a telegram that NFO was "becoming handler on North Texas market. Will get qualifications as an association of farmers at same time."

985. On February 22, 1971, Gage as General Counsel for Mid-Am, wrote NFO, attention Oren Lee Staley, President, a letter in which Gage stated Mid-Am's legal position in regard to a list of Mid-Am members forwarded with that letter.

986. On February 22, 1971 Gage again wrote Beatrice Fort Worth, with a copy to Dunham.

987. On February 22, 1971 Gage wrote to Herbert Forest, Director of the Dairy Division at USDA, and Clifford Hardin, Secretary of Agriculture.

988. Gage sent copies of the letters to Forest and Hardin to Stuart Russell, Sydney Berde and the Texas and Oklahoma Market Administrators Arnold and Dunham.

989. [Rejected]

990. NFO responded to Gage's February 22, 1971 letter by letter of March 2, 1971, which stated in part that NFO had "notified thirteen producers that they cannot market their production through the NFO program while their agreement with Mid-America is in effect."

991. NFO, in its letter of March 2, 1971, invited Gage to meet with NFO to discuss what NFO believed "may develop into a serious problem."

992. On March 5, 1971 Gage declined NFO's invitation to meet with NFO officials.

993. On March 2, 1971, the Mid-Am Board of Directors authorized the filing of the original Complaint in this case.

994. [Rejected] 995. [Rejected]

996. [Rejected] 997. [Rejected]

998. Prior to filing the lawsuit against NFO, counsel for Mid-Am told counsel for AMPI of Mid-Am's intention to sue NFO.

999. [Rejected]

11. NFO's Missouri Program Prior To March 25, 1971

1000. [Rejected] 1001. [Rejected]

1002. By March, 1971, NFO had added some additional producers at Jefferson City and Mountain Grove and opened a new reload at Springfield.

1003. The volume of milk going through NFO's Missouri program had increased from 1.4 million pounds in March, 1970 to 4.7 million pounds in March, 1971.

1004. [Rejected] 1005. [Rejected]

1006. Before producers in Missouri could ship to a handler in Texas, they had to be approved by Texas health authorities.

1007. [Rejected] 1008. [Rejected]

1009. [Rejected] 1010. [Rejected]

12. Missouri Milk Allegedly Checkmated By Mid-Am And AMPI

1011. At approximately the same time that Beatrice at Fort Worth ceased buying NFO milk, Kraft at Springfield notified NFO that it would no longer buy NFO milk.

1012. NFO already had loads scheduled to Kraft when Kraft told NFO it was ceasing purchases.

1013. [Rejected] 1014. [Rejected] 1015. [Rejected]

1016. [Rejected] 1017. [Rejected]

1018. In late March and early April, 1971, Scott and Avila of NFO contacted some other Texas handlers in an effort to get them to buy NFO milk.

1019. NFO offered the Missouri milk to Southland in Texas but Southland did not buy the milk.

1020. [Rejected] 1021. [Rejected] 1022. [Rejected]

1023. NFO tried, but unsucessfully, to sell the Missouri milk to Borden in Texas both in summer, 1970 and March, 1971.

1024. In April, 1971, NFO offered its Missouri milk to Kroger's Vandervoorts plant in Texas at minimum federal order prices but Kroger refused to buy the NFO milk.

1025. AMPI had sold the Vandervoorts plant to Kroger in early 1970.

1026. Al Scott of NFO contacted Rudy of Foremost in late March, 1971 and offered to sell Foremost the NFO southwest Missouri milk which Beatrice had ceased buying.

1027. Rudy of Foremost refused to buy the NFO milk.

1028. [Rejected]

1029. Gandy Dairy was a milk bottler in San Angelo, Texas, in 1971.

1030. Gandy Dairy was a regulated handler on Central West Texas Order 128 in 1971.

1031. Prior to May 1, 1971, Gandy Dairy purchased its full requirements of grade A milk from AMPI.

1032. In March or April, 1971, Gandy Dairy arranged to begin taking part of its requirements from a group of independent dairy farmers, none of whom were in any way affiliated with NFO.

1033. In April, 1971, J. G. Anderson, the AMPI North Texas Division Manager, met with Gandy Dairy officials and discussed with them their contemplated purchases of milk from those independent producers.

1034. [Rejected]

1035. Gandy Dairy received its first delivery of milk from the independent producers on May 1, 1971.

1036. AMPI failed to deliver some milk to Gandy Dairy on May 1 and 2, 1971, and the milk that was delivered on May 1 arrived at Gandy later than usual.

1037. Gandy Dairy assumed that AMPI had not delivered certain milk and was late with other milk because Gandy had begun buying milk from independent producers.

1038. At or about the time that Gandy Dairy began buying milk from independent producers, an AMPI Gold Spot Division employee contacted Gandy's customers concerning sales of Gold Spot milk to such customers.

1039. AMPI's intent in contacting Gandy's customers was to get Gandy to return to AMPI for its full requirements of milk.

1040. In May, 1971, several of Gandy's customers advised Gandy that a Gold Spot representative had contacted them concerning possible sales of milk.

1041. [Rejected] 1042. [Rejected]

1043. [Rejected] 1044. [Rejected]

1045. Two of Gandy's four independent producers ceased shipping to Gandy in 1971.

1046. In spring 1971, after Beatrice Fort Worth stopped taking NFO southwest Missouri milk, NFO offered that milk to Gandy.

1047. [Rejected]

1048. Gandy never bought milk from NFO.

1049. In May, 1971, NFO began selling the milk of some of its Missouri members to Marigold Dairy in Fort Worth, Texas.

1050. [Rejected]

1051. Marigold Dairy at Forth Worth, Texas, ceased buying NFO Missouri milk in late May, 1971.

1052. In late March and April, 1971, Scott of NFO made some efforts to sell NFO producers Missouri milk to Hiland, Foremost, and Kraft at Springfield, Missouri; Fairmont Foods in Oklahoma; Sealtest and Kroger in St. Louis; College Club in Arkansas; and Page Milk Company at Coffeyville, Kansas and Tulsa, Oklahoma.

1053. [Rejected]

1054. On April 23, 1971, other Mid-Am personnel were instructed to follow Northern Division producers in regard to cancellation notices from Mid-Am producers who were also NFO members. Those procedures were "to do nothing."

1055. In late April, 1971 and early May, 1971 Mid-Am's Northern Division refused to acknowledge cancellation requests from three Mid-Am members who were or had been NFO members. Mid-Am's inter-office memoranda showed that Mid-Am recognized that each producer was "entirely free to ship his milk elsewhere at the end of 30-days."

1056. [Rejected]

1057. Mid-Am refused to reveal the termination date of one of its producers contracts to one NFO member in Missouri.

1058. [Rejected] 1059. [Rejected] 1060. [Rejected]

1061. [Rejected] 1062. [Rejected] 1063. [Rejected]

1064. [Rejected] 1065. [Rejected] 1066. [Rejected]

1067. [Rejected] 1068. [Rejected] 1069. [Rejected]

1070. [Rejected] 1071. [Rejected]

13. Alleged Impact Of The Inability To Place The Missouri Milk

1072. [Rejected] 1073. [Rejected] 1074. [Rejected]

1075. [Rejected] 1076. [Rejected] 1077. [Rejected]

1078. [Rejected] 1079. [Rejected] 1080. [Rejected]

1081. [Rejected] 1082. [Rejected] 1083. [Rejected]

1084. [Rejected] 1085. [Rejected] 1086. [Rejected]

1087. [Rejected] 1088. [Rejected] 1089. [Rejected]

1090. [Rejected] 1091. [Rejected]

14. Kansas City Area Producers

1092. [Rejected] 1093. [Rejected] 1094. [Rejected]

1095. [Rejected] 1096. [Rejected] 1097. [Rejected]

15. Southern Illinois Producers

1098. In early 1970, there were NFO members in central and southern Illinois interested in marketing milk through NFO.

1099. Beginning in 1970, NFO attempted to sell the milk of these southern Illinois producers to St. Louis handlers, including Sealtest and Kroger.

1100. [See Finding 1103, *infra.*]

1101. [Rejected]

1102. [Rejected]

16. The Packet Market

1103. NFO began sales to Packet in St. Louis in January, 1972.

1104. [Rejected]

1105. [Rejected]

1106. NFO still sells to Packet.

1107. In January, 1972, NFO pooled 3.3 million pounds of milk on Order 62.

1108. In January, 1973, NFO pooled 6.3 million pounds of milk on Order 62.

17. Foremost Springfield 1975

1109. [Rejected]

1110. [Rejected]

1111. Springfield, Missouri, was a very important market to NFO because the majority of its producers in Missouri were located in and around the Springfield area.

1112. [Rejected]

1113. In 1975, beginning in May, Joe Paris, Assistant Director of the NFO Dairy Department for the State of Missouri, called regularly on Bob Quinn, manager of the Foremost plant at Springfield, in an attempt to sell Foremost milk.

1114. On some occasions Al Scott accompanied Paris to Foremost.

1115. In late June or early July, 1975, Foremost agreed to buy some milk from NFO at Springfield.

1116. [Rejected]

1117. Foremost agreed to begin receiving 40 to 100,000 pounds daily, direct shipped from NFO producers' farms in and around Springfield on July 8, 1975.

1118. NFO initially shipped about 40,000 pounds per day to Foremost and gradually increased to about 100,000 pounds per day.

1119. NFO added some producers to supply the Foremost account.

1120. [Rejected]

1121. Shortly after NFO began supplying Foremost, Mid-Am stated in its Southwest 'A' Pool Market Information bulletin that "So, NFO has done it again. NFO has entered the market by cutting prices on farmers' milk; and is putting considerable pressure on prices at a time when a higher farm price is indicated and by all rights should be expected."

1122. [Rejected] 1123. [Rejected] 1124. [Rejected]

1125. [Rejected] 1126. [Rejected]

1127. On October 15, Quinn notified NFO that it would cease purchases from NFO at Springfield effective October 25, 1975.

1128. After that notification NFO continued to try to sell Foremost milk.

1129. [Rejected] 1130. [Rejected] 1131. [Rejected]

1132. [Rejected] 1133. [Rejected]

1134. [Rejected] 1135. [Rejected]

18. Conclusions

1135A. [Rejected]

1135B. [Rejected]

VI. Chicago

A. CMPC/AMPI Alleged Market Power

1136. Chicago Regional Order 30, covering large parts of southern and eastern Wisconsin, as well as most of northern Illinois, went into effect on July 1, 1968 and has covered essentially that same area from July 1, 1968 down to the present.

1137. In order for milk to be sold by an Order 30 handler in Chicago, that milk must be inspected and approved by the Chicago Department of Health.

1138. From 1968 to the present, approximately 70 per cent of all fluid milk sales in the Chicago Regional Order 30 were accounted for by bottlers in the Chicago Metropolitan area.

1139. In 1968 about 75 per cent of all milk sold to bottlers in Chicago came from Wisconsin.

1140. On July 1, 1967, Pure Milk Association (PMA), an AMPI predecessor, and several plant-operating cooperatives, came together to form Central Milk Sales Agency (CMSA), a common marketing agency.

1141. PMA acted as CMSA's marketing agent.

1142. [Rejected]

1143. On July 1, 1968, the same day Chicago Regional Order went into effect, CMSA and several other Wisconsin and Illinois cooperatives came together to form Central Milk Producers Cooperative (CMPC), a common marketing agency.

1144. CMSA designated CMPC as its marketing agent.

1145. CMPC, in turn, designated PMA, later AMPI, as its marketing agent.

1146. [Rejected]

1147. CMSA members constituted two-thirds of the Board of Directors of CMPC before CMPC was reorganized in fall, 1970.

1148. [Rejected]

1149. From 1968 through 1979, CMPC's members have been:

Members	Dates
Alto Cooperative Creamery Waupun, Wisconsin	1968 — 1979
Associated Milk Producers, Inc.	1969 — 1978
Antigo Milk Products Cooperative Antigo, Wisconsin	1968 until merger with AMPI in 1969

Central Wisconsin Cooperative Dairies Westfield, Wisconsin	1968 — 1969
Consolidated Badger Cooperative	1968 — 1979
Fox River Milk Transfer Cooperative Green Bay, Wisconsin	1970 — 1979
Genoa City Cooperative Milk Association Genoa City, Wisconsin	1968 — 1974
Golden Guernsey Dairy Cooperative Milwaukee, Wisconsin	1969 — 1979
Hampshire Milk Producers Association Hampshire, Illinois	1968 — 1976
Hiawatha Valley Dairies Cooperative Sparta, Wisconsin	1968 — 1979
Independent Milk Producers Cooperative Slinger, Wisconsin	1972 — 1977
Kenosha Milk Producers Cooperative Kenosha, Wisconsin	1968 until merger with AMPI in 1971
Lake to Lake Dairy Cooperative Manitowoc, Wisconsin	1968 — 1979
Madison Milk Producers Cooperative Madison, Wisconsin	1968 until merger with AMPI in 1969
Manitowoc Milk Producers Cooperative	1968 — 1979
Mid-West Dairymen's Cooperative Rockford, Illinois	1970 — 1979
Milwaukee Cooperative Milk Producers Brookfield, Wisconsin	1968 — 1979
North Central Dairy Cooperative	1970 — 1971
Outagamie Producers Cooperative Black Creek, Wisconsin	1968 — 1979
Pure Milk Association Chicago, Illinois	1968 until merger with AMPI in 1969
Pure Milk Products Cooperative Fond du Lac, Wisconsin	1968 until merger with AMPI in 1971
Racine Milk Producers Cooperative Association, Racine, Wisconsin	1968 — 1975
Wisconsin Dairies Cooperative Baraboo, Wisconsin	1968 — 1979

Woodstock Progressive Milk Products
Woodstock, Illinois — 1968 — 1979

1150. [Rejected] 1151. [Rejected]

B. Chicago As The Alleged Linchpin Market

1152. [Rejected] 1153. [Rejected]

1154. [Rejected]

C. AMDI's Involvement In The Alleged Conspiracy

1155. Among the Chicago metropolitan area bottlers regulated by Chicago Order 30 were the following:

Country Delight Milk Products, Inc.
A subsidiary of Certified Grocers, Inc.

Borden, Inc.

Hawthorn-Mellody, Inc.

Dean Foods Company

Meadowmoor Dairy, Inc.

Those handlers and many others were members of Associated Milk Dealers, Inc. (AMDI), a trade association.

1156. Every member of AMDI was a proprietary.

1157. [Rejected]

1158. A superpool price in Order 30 was, by definition, higher than the minimum price.

1159. After CMPC's formation, the Price Development Committee of CMPC and AMDI's Producer Relations Committee met from time to time.

1160. [Rejected]

1161. CMPC published monthly price announcements reflecting superpool prices established by CMPC.

1162. [Rejected]

D. The Standby Pools

1163. CMPC contributed funds to support a reserve pool of Grade A milk available to all contributing buyers at a uniform charge all year long.

1164. One reason that CMPC contributed to the standby pool was to prevent a reduction in blend price of the Chicago market.

1165. [Rejected]

1166. CMPC operated a "standby pool" consisting of Chicago-inspected proprietary manufacturing plants.

E. NFO's Early Efforts In Wisconsin

1167. As early as 1967, NFO was selling memberships to dairy farmers in Wisconsin.

1168. In late 1967 and throughout 1968, NFO's dairy program in Wisconsin was generally limited to signing dairy farmers up to NFO membership agreements.

1169. By June, 1968, two assistant directors of the NFO dairy Department began spending some of their time working in Wisconsin.

1170. As early as 1968, some NFO members in Wisconsin wanted NFO to market their milk.

1171. Beginning in early 1969, NFO negotiated milk supply contracts with a number of manufacturing plants in Wisconsin.

1172. NFO began orgainizing in Wisconsin milk truck routes composed of NFO members in 1969.

1173. [Rejected]

1174. NFO began its efforts to establish a Grade A dairy program in Wisconsin in early 1969.

1175. North Central Dairymen's Cooperative (NCDC) of Owen, Wisconsin, had been formed in 1964.

1176. NCDC members, many of whom were NFO members from the time it was formed, wanted NFO to market their milk.

1177. By mid-1969, a number of NFO Grade A dairy farmer members were on NFO hauling routes in southeastern Wisconsin.

1178. In early 1969, NCDC officials considered opening a reload station at Hartford in southeastern Wisconsin.

1179. [Rejected] 1180. [Rejected]

1181. In 1969, NFO, asked some of its members to ship their milk to NCDC's Hartford plant.

1182. In fall, 1969, after Antigo Milk Producers Cooperative in Wisconsin merged into AMPI, a number of NFO producers at Antigo indicated their desire to market milk through NFO.

1183. [Rejected] 1184. [Rejected]

1185. By late 1969, NFO had established truck routes of a number of dairy farmers in a number of places in Wisconsin. May of those farmers were also members of NFO.

1186. [Rejected]

1187. As early as 1969, NFO sought qualification from USDA in federal milk marketing orders.

1188. In 1969, Ricardo Avila, assistant director of the NFO Dairy Department, familiarized himself with the various requirements of Chicago Order 30 and the Chicago health regulations and procedures for transferring producers from other organizations to NFO.

1189. [Rejected]

1190. In June, 1969, Sidney Wanzer & Sons, Dairy (Wanzer) in Chicago, an Order 30 regulated handler, began buying NCDC milk.

1191. Soldwedal of Wanzer testified that one reason he purchased NCDC milk for Wanzer was that he preferred to have at least two suppliers. Soldwedal's primary reason, however, for buying milk from any source was price.

F. The Alleged Reaction Of The Alleged Co-Conspirators

1192. [Rejected] 1193. [Rejected]

1194. In November, 1969, counsel for CMPC directed Wanzer Dairy's attention to § 185.42 of the Wisconsin Statutes.

1195. [Rejected]

1196. On January 6, 1970 representatives of CMPC and AMDI met to discuss certain marketing problems, including the cost of hauling.

1197. At the January 6, 1970 CMPC/AMDI meeting, some AMDI members indicated to the CMPC representatives present that they were upset about Wanzer's buying NCDC milk at below the CMPC price.

1198. [Rejected]

1199. CMPC, among other actions, terminated its superpool premium effective February 16, 1970.

1200. [Rejected] 1201. [Rejected]

1202. From February 16, 1970 through February 14, 1971, CMPC charged no superpool premiums on Class I milk sold in Order 30.

1203. Beginning March, 1970 and continuing through February 14, 1971, CMPC announced a 5 cent (6 cent beginning October, 1970) market service charge applicable to any Order 30 buyer who received milk from any source for which CMPC was the authorized marketing agent.

1204. This service charge was in addition to the basic 18-1/2 cent plant handling charge.

1205. [Rejected] 1206. [Rejected] 1207. [Rejected]

1208. [Rejected] 1209. [Rejected]

1210. On or about April 20, 1970, CMPC announced service charges which would go into effect May 1, 1970.

1211. The service charges announced by CMPC on April 20, 1970 included a 36-1/4 cent per cwt. service charge applicable to any buyer "who accounts to and settles with CMPC for less than 100% of his Class I requirements" on "all purchases in other months in excess of 110% of average purchases May through June."

1212. [Rejected] 1213. [Rejected] 1214. [Rejected]

1215. Wanzer's purchases of raw milk were generally greatest in the months of September through November.

1216. NCDC member production was at its highest level in May and June, 1970.

1217. [Rejected]

G. Mid-Am Alleged Involvement

1218. Gary Hanman has been Mid-Am's liaison with AMPI since 1969 "to eliminate problems which may develop" between the two organizations.

1219. During the period 1969 through 1971, Gary Hanman kept aware of the pricing situation in the Chicago Order by reading CMPC price announcements.

1220. Mid-Am was interested in pricing in Chicago because of the effect Chicago pricing might have on pricing in other areas where Mid-Am operated, including Missouri.

1221. [Rejected] 1222. [Rejected] 1223. [Rejected].

1224. [Rejected] 1225. [Rejected] 1226. [Rejected].

1227. [Rejected] 1228. [Rejected]

H. NFO's Dairy Program In Wisconsin

1229. In early 1970, NFO began to plan for the possible opening of reload stations and the establishment of a dairy marketing program.

1230. After getting Wanzer to agree to buy more NFO milk in early 1970, NFO recruited additional dairy farmers for its dairy program in Wisconsin.

1231. In 1970, NFO convened various meetings attended by a number of dairy farmers in Wisconsin to discuss the NFO dairy program.

1232. The dairy farmers attending these 1970 NFO meetings were interested in the NFO Grade A dairy program in Wisconsin.

1233. Some of the dairy farmers at these 1970 NFO meetings in Wisconsin may not have been members of NFO.

1234. In 1970, many farmers in Wisconsin were unhappy with the prices they were receiving for milk.

1235. Approximately 18 to 21% of AMPI's Tri-States Region members—some 2,000 dairy farmers—were or had been members of NFO, beginning in 1955.

1236. [Rejected].

1237. The first Wisconsin reload was opened in June, 1970 at Stoughton. So far as inspection was concerned, the Stoughton reload was considered as an extension of the Wanzer plant.

1238. In June, 1970 Wanzer Dairy began buying milk from dairy farmers, many of whom were NFO members, who delivered their milk to the Stoughton reload which was operated by dairy farmers who were NFO members.

1239. [Rejected]

1240. NFO became qualified by the USDA to act as a cooperative under Order 30 in July, 1970 with respect to those members of NFO whose milk was received at the Stoughton reload and thereafter marketed under Order 30.

1241. [Rejected] 1242. [Rejected] 1243. [Rejected]

1244. In July, 1970, AMPI Mid-States Region divisional manager McKee recommended that AMPI marketing personnel develop a program aimed at selling milk on a year round full supply basis to all handlers, whether Grade A or B.

1245. AMPI was concerned that NFO price cutting would undermine the premiums being paid on the Chicago market.

1246. [Rejected] 1247. [Rejected]

I. CMPC Allegedly Tries To Get NFO to Join The Club

1248. After NFO became qualified on Order 30 (see finding 140, *supra*) in July, 1970, CMPC offered a membership and marketing agreement to NFO with respect to the milk of those producers for whom it was marketing on Order 30.

1249. [Rejected] 1250. [Rejected]

1251. [Rejected] 1252. [Rejected]

1253. NFO refused to join CMPC.

1254. [Rejected]

1255. Effective October 15, 1970, NCDC signed a Membership and Marketing Agreement with CMPC.

J. CMPC Allegedly Considers Suing NFO To Reestablish Superpool Premiums

1256. [Rejected] 1257. [Rejected] 1258. [Rejected]

1259. [Rejected] 1260. [Rejected] 1261. [Rejected]

1262. [Rejected] 1263. [Rejected] 1264. [Rejected]

K. The October 19, 1970 Announcement

1265. At its October 15, 1970 meeting, the CMPC Board approved of CMPC's sending out a new announcement concerning service charges to be effective December 1, 1970 in District I (Chicago) only.

1266. The minutes of the October 15, 1970 CMPC Board meeting show that one CMPC member asked about the legality of the CMPC price announcement to be effective December 1, 1970 and that he was advised that its legality had been approved by CMPC counsel and "outside counsel at the request of the President."

1267. [Rejected]

1268. On October 19, 1970, CMPC issue that new schedule of service charges to be effective December 1, 1970.

1269. The on October 19, 1970 CMPC announcement provided that "for milk to supply a dealer who does not report to or settle with CMPC for his total Class I requirements," the effective CMPC service charge would be 37-1/4 cents "for milk supplied through a supply plant or other receiving center for which CMPC is the authorized marketing agent" and that "any buyer may select one of the . . . options" set forth in the announcement.

1270. [Rejected] 1271 [Rejected] 1272. [Rejected]

1273. [Rejected] 1274 [Rejected] 1275. [Rejected]

1276. [Rejected]

L. The October 19, 1970 Alleged Cabal

1. The Meeting

1277. On October 19, 1970, Mid-Am representatives Hanman and Gage met with AMPI representatives Russell, McWilliams, Jim Hill and Andy Anderson, as well as Westwater of DI at the Sheraton Motor Inn at Bloomington, Minnesota.

1278. McWilliams was chairman of CMPC's Price Development Committee.

1279. McWilliams occasionally attended ARSPC meetings.

1280. Westwater of DI was general manager of ARSPC.

1281. Anderson, Hanman and Gage were on the ARSPC Operations Committee in fall, 1970.

1282. Hanman, Russell and Gage were members of a special ARSPC pooling committee appointed on October 19, 1970.

1283. This October 19, 1970 meeting was held in the Bloomington, Minnesota Sheraton Inn, the same place where ARSPC held a meeting that day.

1284. The purpose of this October 19, 1970 meeting between representatives of AMPI, Mid-Am and DI was to discuss similar experiences that these three cooperatives had relative to NFO's solicitation of their members and NFO's marketing milk in their markets at cut-rate prices.

1285. [Rejected]

2. The Alleged Aftermath

a). The Alleged Poisoning Of NFO's Well

1286. On October 9, 1970, counsel for Mid-Am wrote a letter to the Director of Marketing Services of the Wisconsin Department of Agriculture, inquiring whether his department had reviewed the question of NFO's legal status with the Attorney General of Wisconsin.

1287. Counsel for Mid-Am sent counsel for AMPI and counsel for CMPC carbon copies of that letter.

1288. On November 5, 1970 the Order 30 Market Administrator sent a report to the Director of the Dairy Division of the Department of Agriculture in Washington concerning a meeting he had with representatives of AMPI and CMPC in regard to NFO status under Order 30.

1289. That report stated that at a meeting held October 26, 1970 CMPC and AMPI representatives raised questions concerning NFO's qualification on Order 30.

1290. subsequent to the October 26, 1970 meeting, counsel for AMPI wrote the USDA for a copy of NFO's application for qualification in connection with a USDA Notice of Hearing to consider a definition of the term "cooperative association."

1291. On October 27, 1970 counsel for CMSA wrote the Wisconsin Department of Agriculture about NFO's marketing the milk of Wisconsin dairy farmers. That letter, written at the request of the Director of Marketing Services, raised a number of legal questions and stated, among other things, that the "Wisconsin cooperatives which I represent have no quarrel with the legitimate activities of any responsible farm organization." It also stated that "We believe that the unregulated acitivites of a purported 'cooperative' operating without corporate responsibility could, unless corrected, undermine the cooperative structure built so carefully in Wisconsin over the past half century."

1292. In November, 1970 counsel for Mid-Am wrote the Missouri State Attorney General concerning various aspects of NFO's milk marketing activities.

1293. Herbert Forest, the Director of the Dairy Division at the USDA, discussed NFO's qualification with the Missouri Attorney General's office.

1294. Mid-Am prompted the Missouri Attorney General's office inquiry to the USDA concerning NFO's qualification.

1295. The Wisconsin Department of Agriculture also contacted the USDA concerning NFO's operations at Stoughton.

b). Publicizing NFO's Price Cutting

1296. On November 6, 1970, CMPC established a Press Relations Committee to disseminate information about CMPC through the press, radio and television.

1297. Mid-Am disseminated information to Mid-Am members to publicize NFO's price cutting in Chicago.

M. NFO Wisconsin Dairy Program In Fall, 1970

1298. [Rejected]

1299. By September, 1970, various individual members of NFO established five reloads in Wisconsin (Stoughton, Hartford, Cuba City or Dickeyville, Menasha and Taylor) and one in northern Illinois (Harvard).

1300. Less than one hundred producers shipped their milk through the Stoughton reload in June and July, 1970.

1301. By the end of 1970, a larger number of producers were participating in the NFO Order 30 Grade A dairy program.

1302. Each reload that NFO members established in Wisconsin was eventually equipped to handle at least two hundred producers' milk.

1303. [Rejected] 1304. [Rejected]

1305. In fall, 1970 Wanzer was willing to take all the NFO Order 30 reload milk that NFO could deliver at the minumum federal order price.

1306. NFO sales in pounds to Wanzer from June, 1970 through December, 1970 were as follows:

Month/Year	Class I	Class II	Total	Percentage Allocation to Class I
6/70	1,055,940	159,960	1,215,900	86.8
7/70	1,018,431	426,819	1,445,250	70.5
8/70	3,724,563	1,026,987	4,751,550	78.4
9/70	8,472,276	2,435,894	10,908,170	77.7
10/70	8,582,716	1,461,544	10,044,260	85.4
11/70	7,231,946	2,159,599	9,391,545	77.0
12/70	9,742,973	2,040,229	11,783,202	82.7

1307. [Rejected] 1308. [Rejected]

1309. In late 1970 NFO dairy farmers were able to get primiums of 25 to 60 cents per cwt. over the M-W Series price for Wisconsin Grade A milk which Wanzer did not receive and which NFO diverted to manufacturing plants.

N. CMPC Alleged Pressure Allegedly Gets To Southland

1310. [See finding 1312, *infra*].

1311. As of November, 1970 there was no practical alternative supply source for all of Wanzer's requirements other than CMPC.

1312. On November 10, 1970, Wanzer advised NFO by letter that Wanzer would discontinue the purchase of raw milk from receiving stations at Stoughton, Hartford, and Harvard, Wisconsin, for the Wanzer plant in Chicago, effective midnight November 30, 1970.

1313. [Rejected] 1314. [Rejected] 1315. [Rejected]

1316. [Rejected] 1317. [Rejected]

1318. On November 27, 1970 NFO wrote Wanzer a letter that stated that "NFO will in behalf of its members guarantee additional plant handling charges after December 1, 1970 up to 37-1/4 cents per cwt. until January 1, 1971."

1319. On November 23, 1970, Wanzer notifies CMPC that it would comply with the terms of CMPC's October 19, 1970 price announcement.

O. AMPI Allegedly Uses Leverage In The South

1320. [Rejected] 1321. [Rejected]

1322. [Rejected] 1323. [Rejected]

1324. While employed by Southland from 1969 to 1971, Reeves negotiated with AMPI for milk for Southland's plants in Texas, Oklahoma and Memphis.

1325. [Rejected] 1326. [Rejected]

1327. [Rejected] 1328. [Rejected]

1329. ARSPC held a Board of Directors meeting in Las Vegas, Nevada on November 30, 1970.

1330. [Rejected]

P. Southland Agrees To Participate For A Month

1331. [Rejected]

1332. On November 30, 1970, Wanzer agreed that it "would pay CMPC 6 cents per cwt. on all Class I sales as per [CMPC's] announcement of November 6, 1970" pursuant to the option provided in CMPC's October 19, 1970 price announcement.

1333. On December 2, 1970 Southland directed its subsidiary Wanzer to purchase milk from NFO and CMPC during the month of December, 1970, and thereafter until further notice, on the same pro rata basis as it had during November, 1970. Henry Soldwedel of Wanzer was advised that any change in those instructions would have to be personally approved by Cochran of Southland.

1334. [Rejected]

Q. AMDI Allegeldy Insists On A Six-Month Contract

1335. On December 2, 1970, officials of CMPC and AMDI met do discuss CMPC's policy of meeting competition.

1336. The question of whether Wanzer was going to pay the 6 cent service charge on milk purchased and used for Class I purposes was discussed.

1337. AMPI officials told Hawthorn-Mellody that Southland-Wanzer had agreed for December.

1338. As early as December, 1970 some AMDI members objected to paying more for milk than the price paid by other dealers with whom they were in competition.

1339. Particular dealers stated that they objected to paying any CMPC superpool primium as long as their competitors were receiving milk at a lower price.

1340. [Rejected] 1341. [Rejected] 1342. [Rejected]

R. CMPC Allegedly Threatens Cut-Off To Force Southland To Sign One-Year Contract

1343. In early December, 1970, AMPI officials, including McWilliams and Dave Parr (D.P.), were attempting to meet with Southland officials.

1344. OnDecember 7, 1970 Wanzer rescinded an earlier letter dated November 10, 1970 and notified NFO that it would continue to purchase milk from the NFO Wisconsin reloads on a day-to-day basis only.

1345. On December 8, 1970, AMPI had a hearsay report that NFO had recently been given another month to obtain a full supply for Wanzer.

1346. On December 10, 1970, CMPC wrote Wanzer a letter which stated that CMPC would not deliver any milk to Wanzer after December 15, 1970 because "we have become aware that you have been engaged with others in unlawful attempts to

interfere with producers whose milk is subject to effective marketing agreements with CMPC and its members."

1347. [Rejected]

1348. CMPC informed Cochran of Southland of its December 10, 1970 letter.

1349. [Rejected]

1350. On December 15, 1970, counsel for CMPC advised Wanzer that in light of pending discussions between representatives of Wanzer and CMPC to effect an amicable settlement of their differences, CMPC would continue to deliver milk to Wanzer on a day-to-day basis pending further discussions and mutual agreement on future terms of sale.

1351. On December 16, Southland executed a one-year milk supply agreement with CMPC to buy certain of its Class I requirements from CMPC commencing January 1, 1971. That agreement was executed by CMPC on December 22, 1970.

1352. [Rejected]

1353. [See finding 1351, supra]

1354. [Rejected]

1355. In December, 1970 Southland advised NFO and Wanzer that throughout 1971, Wanzer would need to purchase six to six and a half million pounds of milk per month from the three NFO Wisconsin receiving stations.

1356. In early 1971, Graf, Avila and Scott of NFO met with Reeves of Southland at Des Moines, Iowa, to discuss NFO's supply arrangement with Wanzer, among other things.

1357. [Rejected]

S. CMPC And AMDI Allegedly Agree To Reestablish Superpool Premiums

1358. In late December, 1970, CMPC met with a number of Chicago members of AMDI and showed those dealers the one-year CMPC-Southland contract.

1359. [Rejected] 1360. [Rejected]

1361. Wanzer was apparently a member of AMDI in January, 1971.

1362. On January 11, 1971, CMPC representatives met with various milk dealers in Chicago.

1363. [Rejected] 1364. [Rejected]

1365. On January 12, 1971, CMPC announced a Zone I, Class I price increase of 50 cents/cwt. to $6.59, effective February 15, 1971, later modified on February 1, 1971 to 6.39/cwt., Zone I, Class I.

1366. The January 13-14, 1971 AMPI Board meeting received a report from McWilliams on the Superpool in Chicago.

1367. [Rejected]

1368. On February 1, 1971 CMPC announced a 30 cent/cwt. over order Class I price of $6.39 effective February 15, 1971.

1369. [Rejected]

T. Alleged Effect Of CMPC-Wanzer Contract On NFO

1. The Alleged Cutback

1370. The December 22, 1970 CMPC-Southland contract went into effect on January 1, 1971.

1371. [Rejected]

1372. Beginning January, 1971, Wanzer bought more than the estimated 15.4 million pounds of Class I milk from CMPC called for in the December 22, 1970 contract.

1373. [Rejected]

1374. NFO sales in pounds to Wanzer from January, 1971 through July, 1971 were as follows:

Month/Year	Class I	Class II	Total[1]	Percentage Allocation to Class I
1/71	1,885,575	3,651,974	5,537,549	34.1
2/71	1,413,935	4,294,945	5,708,660	24.8
3/71	3,138,583	5,266,537	8,405,120	37.3
4/71	2,475,727	4,158,633	6,634,360	37.3
5/71	2,378,243	4,989,867	7,368,110	32.3
6/71	784,102	4,204,548	4,988,650	15.7
7/71	211,591	3,159,029	3,370,620[2]	6.6

1. Total shipments by NFO to Wanzer in January, 1971 were 5,579,729 pounds, including 42,180 pounds that NFO sold to an ice cream company after the milk was first received at and pumped through Wanzer's plant.

2. Total shipments by NFO to Wanzer in August, 1971 were 6,935,648 pounds, including 1,543,127 pounds that NFO sold to manufacturing plants after the milk was first received at and pumped through Wanzer's plant.

2. NFO Allegedly Forced To Sell To Cheese Plants

1375. Any Wisconsin Grade A milk that NFO did not deliver to Order 30 bottling plants, including Wanzer, was sold to Wisconsin manufacturing plants generally, at prices which returned more money per cwt. to the NFO dairy farmer member than if that milk had been sold to Wanzer.

1376. [Rejected]

1377. The NFO dairy farmers received premiums on the milk shipped to northern Wisconsin manufacturing plants in spring, 1971.

3. AMDI Allegedly Boycotts NFO

1378. Beginning in January, 1971, NFO looked for other Order 30 Class I outlets so that it could qualify its producers' milk in the fall, 1971 qualifying season.

1379. NFO experienced difficulty finding buyers for its Wisconsin milk in spring, 1971.

1380. Throughout the first half of 1971, Avila and Kanerva of NFO contacted a number of Class I handlers in Order 30 in an attempt to find an outlet for NFO Wisconsin milk for the fall, 1971 qualifying season.

1381. In January, 1971, NFO unsuccessfully attempted to sell NFO members' Wisconsin milk to Dean Foods.

1382. [Rejected]

1383. After January, 1971, NFO again offered NFO Wisconsin milk to Dean Foods, but received the same response as it had in January.

1384. [Rejected]

1385. Dean Foods had an agreement with CMPC that it would buy CMPC milk provided CMPC would meet any competitive price in the market.

1386. [Rejected]

1387. Hawthorn-Mellody's Chicago Division received most of its milk from CMPC.

1388. [Rejected]

1389. Hawthorn-Mellody bought some milk from suppliers other than CMPC. It did not, however, agree, to buy any milk from NFO producers.

1390. NFO made some attempt to sell NFO Wisconsin milk to the following Order 30 handlers who were AMDI members: Jewel Tea and Borden.

1391. [Rejected] 1392. [Rejected]

1393. NFO managed to qualify all of the Order 30 reloads as pool supply plants during August, 1971.

1394. In some instances, NFO producers had to ship their milk into Chicago, have it pumped through an Order 30 handler's facility and then reloaded and reshipped to a manufacturing plant in upstate Wisconsin.

1395. NFO received no plant handling charge on this "put through" milk.

1396. [Rejected]

1397. [See footnote 2, finding 1374, *supra.*]

4. Producer Growth Allegedly Slows To A Crawl

1398. By August, 1971 various individual members of NFO established milk reloads at Tomah, Sauk City and Marathon City to bring the total of similar Order 30 reloads up to nine.

1399. [Rejected] 1400. [Rejected] 1401. [Rejected]

1402. [Rejected] 1403. [Rejected] 1404. [Rejected]

U. AMPI Allegedly Moves To Take NFO Producers

1405. A January 18, 1971 memorandum relaying "reports" concerning two of the NFO reloads caused two AMPI employees to believe that "NFO's house of cards may be on the verge of tumbling down."

1406. In a January 25, 1971 memorandum to its fieldmen in Wisconsin, AMPI instructed those field men to contact all Wisconsin dairy farmers who formerly shipped through AMPI and others active in NFO for a good will return visit.

1407. AMPI field service personnel may have solicited NFO dairy farmer members after receipt of that memorandum.

1408. [Rejected]

1409. [See Finding 1405, *supra.*]

1410. On January 8, 1971, AMPI counsel wrote NFO a letter in which AMPI's legal position was stated.

1411. Mid-Am and CMPC received copies of AMPI's counsel's letter of January 8, 1971 to NFO.

1412. Wanzer and Southland received copies of AMPI's counsel's letter of January 8, 1971 to NFO.

V. The PMPC Merger

1413. By late 1970 or early 1971, PMPC had about 11,000 members in Wisconsin, 6,000 Grade A and 5,000 Grade B.

1414. PMPC had explored the possibility of a merger with PMA, later AMPI, prior to 1971 but PMA was not interested.

1415. In a letter dated September 16, 1970 McWilliams of AMPI stated to Parr of AMPI's "game plan" to be followed in discussing merger was the idea that the market power of a combined AMPI/PMPC would far outstrip that of any other group.

1416. [Rejected] 1417. [Rejected] 1418. [Rejected]

1419. [Rejected] 1420. [Rejected]

1421. Effective May 1, 1971, PMPC merged into AMPI.

1422. PMPC published and circulated a Special Merger Edition of its news publication on April, 1971.

1423. [Rejected]

W.NFO Breaks into Kraml

1424. NFO first began negotiating with Kraml Dairy (Kraml) in Chicago in spring, 1971.

1425. [Rejected]

1426. NFO reduced its plant handling charge to 12 cents for Kraml.

1427. NFO agreed on August 19, 1971 to supply Kraml Dairy in Chicago with milk from September 1 to July 31, 1972

at a price based on CMPC's announced price plus a 5 cent per cwt. plant handling charge on Class I milk and a 17 cent per cwt. handling charge on milk allocated to Class II, together with some further adjustments relating to hauling charges.

1428. NFO's Class I price to Kraml was below what NFO had been charging Wanzer.

1429. [Rejected] 1430. [Rejected]

1431. From September, 1971 through November, 1976, NFO sold milk to Wanzer and Kraml below CMPC's price.

1432. The 1971 Kraml contract, although providing members of NFO living in Wisconsin with a market, did not reflect favorably on NFO's dairy marketing ability.

1433. [Rejected]

1434. NFO began shipping milk of its members to Kraml around the first of September, 1971.

X. AMPI Sues NFO In Wisconsin State Court

1435. On August 30, 1971, CMPC learned that Wanzer had elected to cancel the one year contract it had signed with CMPC in December, 1970.

1436. [Rejected]

1437. On August 31, 1971, AMPI and PMPC sued NFO in Wisconsin State court for allegedly inducing producers to terminate or breach their AMPI and PMPC contracts.

1438. [Rejected] 1439. [Rejected] 1440. [Rejected]

1441. [Rejected] 1442. [Rejected] 1443. [Rejected]

1444. [Rejected] 1445. [Rejected] 1446. [Rejected]

1447. [Rejected] 1448. [Rejected] 1449. [Rejected]

1450. [Rejected] 1451. [Rejected]

1452. Arent, Fox, Kintner, Plotkin & Kahn, the law firm representing AMPI in both *Alexander* and *PMPC* v. *NFO*,

represented NCDC in the *Alexander* case and the Wisconsin State court case.

Y. AMPI Allegedly Resorts To Credits To Keep NFO Threat In Check

1453. [Rejected] 1454. [Rejected] 1455. [Rejected]

1456. [Rejected] 1457. [Rejected]

1458. On January 3, 1972, Southland was advised that there was going to be a meeting of the CMPC Price Committee on Wednesday, January 5, 1972.

1459. On or about January 6, 1972, CMPC notified all CMPC buyers that it would issue a 6-1/2 cent per cwt. credit on CMPC Class I premium milk sold in Cook and DuPage Counties in Illinois for the months of September through December, 1971.

1460. The 6-1/2 cent per cwt. CMPC credit in Cook and DuPage Counties was designed to meet competition.

1461. After Kraml learned of CMPC's January, 1972 retroactive credit, it sought a retroactive price adjustment from NFO in accordance with its August 19, 1971 agreement with NFO.

1462. NFO refused to give Kraml a retroactive price adjustment on advice of NFO's counsel.

1463. On or about March 14, 1972, CMPC notified all CMPC buyers that it would issue a 6-1/2 cent per cwt. retroactive credit on all CMPC Class I premium milk sold in Cook and DuPage Counties in Illinois for the months of January and February, 1972.

1464. On August 7, 1975 CMPC announced that all competitive price credits to meet competition from producers who sell milk for prices lower than CMPC would be terminated on September 1, 1975.

1465. [Rejected]

1466. [See finding 1464,*supra*.]

1467. [Rejected] 1468. [Rejected]

1469. In fall 1975 Kraml deducted some $45,000 from what it owed NFO because CMPC had announced a 12, then 13-1/2 cent, per cwt. retroactive credit (in addition to the 6-1/2 cent basic credit) covering the months of May through August, 1975.

1470. NFO sought to recover the $45,000 from Kraml but was unsuccessful because NFO felt that it could not force the issue of the $45,000 retroactive credit with Kraml because Kraml was really the only Order 30 market that NFO had and, if it lost it during the fall of 1975, it might not be able to pool its producers' milk on Order 30 until the next fall qualifying season.

1471. [Rejected] 1472. [Rejected]

1473. [Rejected] 1474. [Rejected]

Z. Conclusions

1475. [Rejected] 1476. [Rejected] 1477. [Rejected]

VII. The Minnesota Experience

A. AMPI-Mid-Am Northern Mergers, 1969 - 1970

1478. In early 1969 there were a number of independent milk manufacturing plants in Minnesota, some operated by farmer cooperatives and some by independent entrepreneurs ("proprietaries").

1479. AMPI, Mid-Am and ADI were interested in the manufacturing facilities as they existed in Minnesota.

1480. AMPI and Mid-Am in 1969 began to merge with, acquire or consolidate with particular Minnesota proprietary plants and cooperatives.

1481. [Rejected] 1482. [Rejected]

1483. Plants in Minnesota and Wisconsin which had signed contracts with NFO were loosely referred to by some persons in the industry as "NFO plants."

1484. During the 1960's, particular NFO members in Minnesota and western Wisconsin directed their milk to plants which had signed contracts with NFO.

1485. [Rejected] 1486. [Rejected] 1487. [Rejected]

1488. [Rejected] 1489. [Rejected]

1490. In 1969, Five Star Dairyland Cooperative was one of the larger cooperatives in the State of Minnesota with more than 2,500 member producers.

1491. Five Star had manufacturing plants at Clarkfield, Paynesville, and New Ulm.

1492. Five Star had signed milk supply contracts with NFO in April, 1969.

1493. MPI merged with the Five Star Dairyland Cooperative of New Ulm, Minnesota on July 1, 1969.

1494. In August, 1969, merger with MPI was approved by the producers of the Turtle Lake Cooperative Creamery Association, Turtle Lake, Wisconsin, and Boyceville Cooperative, Boyceville, Wisconsin.

1495. The vote for consolidation of the producers serving both the Turtle Lake and Boyceville plants was considered significant in that the producers serving both plants had substantial NFO membership.

1496. MPI merged or consolidated with Minnesota Valley Milk Cooperative at Belle Plaine, Minnesota (Belle Plaine), on September 1, 1969.

1497. [Rejected]

1498. The Belle Plaine plant had 900 patrons—500 direct members and 400 producers delivering through three feeder cooperatives—independent associations operating receiving plants of their own.

1499. [Rejected]

1500. MPI's regional manager reported that MPI, on January 16, 1970 closed down the Belle Plaine manufacturing plant because of its high cost of operation.

1501. [Rejected] 1502. [Rejected] 1503. [Rejected]

1504. The Owatonna Cooperative (Southern Dairy Association) of Owatonna, Minnesota; New Prague; and Rochester Dairy, another cooperative, were all competitors of Belle Plaine when it was acquired.

1505. [Rejected] 1506. [Rejected] 1507. [Rejected]

1508. New Prague, which had 455 patrons, was recognized by AMPI (which replaced MPI October 1, 1969) as an "all NFO plant."

1509. During the 1960's NFO had directed particular NFO members in the New Prague area to ship their milk to the New Prague Dairy Priducts, Inc. plant.

1510. The New Prague plant had a capacity for manufacturing 800,000 pounds of milk daily.

1511. AMPI acquired New Prague December 1, 1969.

1512. [Rejected] 1513. [Rejected]

1514. The following Minnesota-Western Wisconsin cooperatives became a part of AMPI effective October 1, 1969: Rochester Dairy Cooperative, Rochester, Minnesota; Turtle Lake Cooperative Creamery Association, Turtle Lake, Wisconsin; Boyceville Cooperative, Boyceville, Wisconsin; and Farmers' Cooperative Dairy Association of Howard Lake, Minnesota.

1515. On November 1, 1969 AMPI acquired the Delano Cooperative Association of Delano, Minnesota.

1516. Delano was a bottling plant on Twin Cities Federal Order 68.

1517. [Rejected]

1518. Twin Cities Milk Producers agreed on December 2, 1969 to merge with Mid-Am.

1519. On December 1, 1969 AMPI acquired the southern Dairy Association of Owatonna, Minnesota, a large cooperative butter-powder facility with a capacity of 800,000 pounds per day.

1520. Owatonna purchased from approximately 375 direct patrons and seven cooperatives.

1521. [Rejected]

1522. Effective January 1, 1970, AMPI acquired and shut down the St. Charles Condensary Company of St. Charles, Minnesota.

1523. On October 1, 1969 AMPI acquired the Farmers Cooperative Creamery Association of Deer Creek, Minnesota.

1524. [Rejected]

1525. In 1969 North Star [Dairy, St. Paul Minnesota] was an independent cooperative federation which marketed the hard manufactured dairy products produced by its members, which were Minnesota dairy cooperatives.

1526. On October 15, 1969, AMPI acquired the Grey Eagle Cooperative Creamery Association of Grey Eagle, Minnesota.

1527. [Rejected] 1528. [Rejected]

1529. [Rejected] 1530. [Rejected]

1531. Twin Cities Milk Producers was the dominant cooperative in the Twin Cities market area in 1969.

1532. Twin Cities merged with Mid-Am effective April 1, 1970.

1533. Twin Cities had 3,000 members in 1969-1970.

1534. Effective May 1, 1970, the North Star Dairy of St. Paul, Minnesota, merged with Mid-Am.

1535. The North Star-Mid-Am merger was followed by the merger with Mid-Am of eight member cooperatives of North Star Dairy: Zumbro Valley Dairy Association, North Star Dairy-Lakes Region; Tri-County Dairy Cooperative; Hutchinson Creamery Association; Welcome Creamery Association; Benson Cooperative Creamery; Bertha Cooperative Creamery; and West Side Cooperative Creamery.

1536. [Rejected]

1537. The North Star merger added more than 3,000 members, to Mid-Am.

1538. The North Star Dairy-Lakes Region at Fergus Falls, Minnesota was loosely described by some persons in the industry as an "NFO plant," having entered into both master contract and supply contracts with NFO.

1539. [Rejected]

1540. Mid-Am acquired North Star at Fergus Falls shortly after May 1, 1970.

1541. [Rejected] 1542. [Rejected]

1543. Benson Cooperative had a master contract with NFO prior to its acquisition by Mid-Am.

1544. [Rejected]

1545. The Pure Milk Products Company at Winsted, Minnesota, was a privately-owned, large-volume cheese manufacturing operation, located just west of metropolitan Minneapolis-St. Paul.

1546. Mid-Am's 1970 Annual Report stated that the dairy farmers who supplied milk to the Pure Milk plant before its purchase by Mid-Am were not members of any cooperative but that all but a few joined Mid-Am after the purchase.

1547. The Pure Milk plant at Winsted had 500 direct patrons in early 1970 who supplied 60 percent of its receipts.

1548. Pure Milk received the other 40 percent of its needs from eight cooperatives.

1549. In April, 1970 the Pure Milk plant at Winsted had capacity to handle up to one million pounds of milk per day.

1550. [See finding 1546, supra].

1551. Subsequent to its purchase of the Pure Milk Winsted plant, Mid-Am planned new equipment which would double the plant's cheese-producing capacity.

1552. [Rejected] 1553. [Rejected]

1554. The Red Oak Grove Cooperative Creamery of Austin, Minnesota, operated butter-powder manufacturing plants at Twin Lakes and Austin, Minnesota.

1555. Mid-Am acquired the Red Oak Grove Cooperative Creamery on July 1, 1970.

1556. Red Oak Grove had a master contract with NFO.

1557. [Withdrawn]

1558. [Rejected]

1559. Western Wisconsin Dairies Cooperative at Blair, Wisconsin, was large, independent, cheese plant in 1971.

1560. AMPI acquired Western Wisconsin Dairies at Blair effective November 1, 1971.

1561. [Rejected] 1562. [Rejected] 1563. [Rejected]

1564. In 1973 AMPI purchased Theil's Milk Products, Inc., a large proprietary manufacturing plant in Wisconsin which had been an NFO customer.

1565. NFO lost Theil's as a customer after AMPI acquired it.

1566. AMPI has continued to the present day to purchase cooperative and proprietary plants.

1567. [Rejected] 1568. [Rejected]

B. The Order 68 Market In 1970

1569. There were four federal milk marketing orders in the State of Minnesota in 1970:

a) Order 60—The Minnesota-North Dakota Order in the Fergus Falls-Moorhead, Minnesota, and Fargo, North Dakota area;

b) Order 61—the southeastern Minnesota-Northern Iowa Order which took in the Rochester, Minnesota, area and surrounding counties in northern Iowa and southeastern Minnesota;

c) Order 68—The Twin Cities Order which encompassed Minneapolis, St. Paul and outlying counties;

d) Order 69—the Duluth-Superior Order, a small order covering Duluth, Minnesota; Superior, Wisconsin, and adjoining counties. [Our finding in regard through the geographical location of the above Orders is not to be construed as a finding that those areas are "markets" under the antitrust laws.]

1570. [Rejected]

1571. Order 68 was geographically central among the Minnesota orders in 1970.

1572. In 1969 the simple average number of producers as reported in the USDA Statistical Bulletin No. 470 as delivering milk to handlers regulated on the Minnesota orders was Order 60—1,489; Order 61—781; Order 69—665; Order 68—4,416.

1573. The northwestern Wisconsin area has been part of the Twin Cities (Order 68) market milkshed.

1574. The M-W Association was a group of cooperatives including Mid-Am, AMPI, Land O'Lakes and several smaller organizations; it sold milk to Twin Cities' bottlers.

1575. [Rejected] 1576. [Rejected]

1577. The M-W Association, when it began, was an association of competing raw milk supplying organizations on the Twin Cities market.

1578. [Rejected]

1579. In 1970 Mid-Am was an important member of the M-W Association.

1580. [Rejected]

1581. In 1970 several Order 68 handlers were purchasing 100 percent of their milk from Mid-Am.

1582. In 1970 or 1971 the following Order 68 bottling plants were owned and operated by cooperatives: Sanitary Dairy—Land O'Lakes; Nicollet plant—Mid-America; Beaver Falls—Land O'Lakes; Clear Lake—Minnesota Milk Cooperative.

C. NFO Marketing in Minnesota—Order 68

1583. NFO started direct marketing of some manufacturing grade milk in Minnesota in 1969.

1584. Early in 1970 NFO decided to begin exploring the possibility of Class I markets in Minneapolis and St. Paul, the Twin Cities, for its members' milk.

1585. [Rejected]

1586. In 1969 a number of Grade A dairy farmers in Minnesota were also NFO members.

1587. In 1970 or early 1971 there were a number of Grade A producers in the Order 61 area interested in marketing their milk production through NFO.

1588. In 1970 or early 1971 there were a number of Grade A producers in the Order 60 area interested in marketing their milk production through NFO.

1589. In 1970 or early 1971 there were a number of Grade A producers in the Order 68 area interested in marketing their milk through NFO.

1590. [Rejected]

1591. Meetings called by NFO were attended by both NFO members and non-members.

1592. [Rejected]

1593. In 1970 some NFO members in Minnesota wanted NFO to go into direct marketing of milk.

1594. In 1970 NFO had members who were spread over a very broad area surrounding Minneapolis-St. Paul.

1595. In putting together a supply of milk for the Order 68 market, NFO faced the handicap of a lack of independent manufacturing plants in Minnesota for "balancing" NFO's Class I markets — i.e., disposing of Grade A milk not needed for Class I uses.

1596. [Rejected]

1597. NFO was aware of the Minnesota surplus disposal handicap from the beginning.

1598. [Rejected]

1599. NFO contacted an Order 68 handler regarding supplying Grade A milk in May, 1970.

1600. [Rejected]

1601. In May, 1970 NFO approached Ewald Brothers Dairy in Minneapolis, an Order 68 handler, about supplying it with milk.

1602. [Rejected] 1603. [Rejected] 1604. [Rejected]

1605. [Rejected] 1606. [Rejected] 1607. [Rejected]

1608. [Rejected]

1609. After any deal with Ewald fell through, NFO contacted Schroeder Brothers Dairy of St. Paul in regard to a supply of NFO milk.

1610. Schroeder was also being supplied by Mid-Am at the time.

1611. [Rejected] 1612. [Rejected]

1613. NFO arranged to supply for Schroeder with skim milk through the Hastings Cooperative.

1614. NFO's initial supply for Schroeder came from the NFO supply plant at Chetek, Wisconsin, 70-80 miles northeast of the Twin Cities.

1615. The Chetek NFO supply plant opened in May, 1971.

1616. Some NFO dairy farmers around Chetek wanted to market through NFO.

1617. [Rejected]

1618. In 1970 during the same time NFO was talking with Ewald, NFO was holding discussions with the Cloverleaf Creamery of Minneapolis about milk sales.

1619. Cloverleaf was a large handler on Order 68.

1620. Mid-Am supplied Cloverleaf with some milk in 1970.

1621. [Rejected] 1622. [Rejected] 1623. [Rejected]

1624. [Rejected] 1625. [Rejected] 1626. [Rejected]

1627. Cloverleaf did not agree to purchase any milk from NFO in late 1970 or early 1971.

1628. NFO again approached Cloverleaf in the latter part of 1971 after it had begun supplying Schroeder.

1629. NFO began supplying Cloverleaf with some of its requirements in December, 1971.

1630. [Rejected]

1631. NFO supplied the Cloverleaf account from supply plants or reloads at Albertville, Minnesota, and Sauk Center, Minnesota, west and northwest of the Twin Cities; St. Charles Minnesota, south of Minneapolis, near Rochester.

1632. [Rejected]

1633. NFO's Albertville, Sauk Center, and St. Charles facilities were opened after Chetek.

1634. Some of the milk of NFO producers which went through those reloads went to Schroeder and Cloverleaf.

1635. In 1972 NFO was contacted by Ewald about obtaining a supply of NFO milk.

1636. In December, 1972 Ewald began purchasing some milk from NFO.

1637. [Rejected] 1638. [Rejected]

1639. In 1973 NFO had three bottling customers in the Twin Cities area—Schroeder, Cloverleaf and Ewald.

1640. [Rejected]

1641. In 1972 through 1973, Chetek was used by NFO to supply milk to handlers on Order 68.

1642. [Rejected] 1643. [Rejected]

1644. [Rejected] 1645. [Rejected]

1646. In February, 1972 NFO opened its Albertville, Minnesota supply plant.

1647. In May, 1972 NFO advised the Market Administrator that its supply plant at Appleton, Minnesota would serve 50 producers.

1648. [Rejected]

1649. The Appleton plant is located on or near U.S. Highway 59 in western Minnesota, approximately 150 miles west from the Twin Cities and 25 miles east of the Dakota border.

1650. NFO's milk supply at Albertville increased from 275,833 pounds in February, 1972 to 2,644,559 pounds in December, 1972.

1651. NFO's total direct-shipped producer sales on Order 68 increased during 1972 from 4,434,333 pounds in January to 11,711,748 pounds in December, 1972.

1652. [Rejected] 1653. [Rejected]

1654. In 1973 NFO opened another pool supply plant at Sebeka, Minnesota.

1655. NFO entered Order 68 at a price 15 cents under the M-W Association price.

1656. [Rejected] 1657. [Rejected] 1658. [Rejected]

1659. [Rejected] 1660. [Rejected] 1661. [Rejected]

1662. [Rejected]

D. Alleged Shut Out Of Order 60

1663. In 1970 the Moorhead and Fergus Falls, Minnesota areas were covered by Order 60, the Minnesota-North Dakota order. [This is not a finding that Order 60 was a "market" within the meaning of the antitrust laws.]

1664. In 1970 the North Star Dairy-Lakes Region operated a large milk processing plant or plants at Fergus Falls, Minnesota which conducted fluid milk bottling, butter processing, and milk powder manufacturing and was an Order 60 supply plant.

1665. NFO had a number of dairy farmers in membership in the Fergus Falls area in the 1960's and early 1970's.

1666. In 1964 NFO signed a master contract with Fergus Dairy, one of the predecessors of North Star Dairy-Lakes Region.

1667. In 1969 NFO entered into a milk supply contract with North Star Dairy-Lakes Region.

1668. In 1970 a substantial number of the producers supplying North Star Dairy-Lakes Region at Fergus Falls were NFO members.

1669. The Fergus Falls plant had about 1,500 farmer-suppliers in 1970, about 600 of these suppliers were direct members of the cooperative and the remainder were members of feeder cooperatives.

1670. July 1, 1970, Mid-Am acquired the North Star-Lakes Region.

1671. [Rejected]

1672. Fairmont Foods Company, Inc., operates a milk bottling plant at Moorhead, Minnesota, as well as plants in other locations through the mdiwest.

1673. Fairmont's Moorhead, Minnesota, plant was regulated under Order 60.

1674. Prior to November, 1971, Fairmont-Moorhead obtained its supply of raw Grade A milk from more than 200 dairy farmers who were not members of any cooperative.

1675. Fairmont-Moorhead was the major handler on Order 60.

1676. [Rejected]

1677. In 1970, Mid-Am and Fairmont-Moorhead were negotiating a possible deal whereby Fairmont would agree to take a full supply of milk at Moorhead from Mid-Am for the next five years.

1678. [Rejected] 1679. [Rejected] 1680. [Rejected]

1681. [Rejected] 1682. [Rejected] 1683. [Rejected]

1684. [Rejected]

1685. NFO attempted to make sales on Order 60 to Fairmont-Moorhead.

1686. NFO also attempted to sell milk to Mid-Am Fergus Falls, but Mid-Am refused to buy until about 1977.

1687. [Rejected] 1688. [Rejected]

E. Alleged Foreclosure From Order 61

1689. Federal Order 61, the Southeastern Minnesota-Northern Iowa Order, regulated the marketing of milk in the Rochester, Minnesota, and certain specified surrounding counties in 1969 through 1976. [This is not a finding that Order 61 was a "market" within the meaning of the antitrust laws.]

1690. During the period 1969 through 1976, the Marigold Foods, Inc., bottling plant in Rochester, Minnesota, was the major Class I handler on Order 61 and as of March 25, 1976, processed approximately 90 per cent of the Order's Class I milk.

1691. Marigold at Rochester operated its milk bottling in a facility owned by Rochester Dairy Cooperative, a cooperative, until October 1, 1969, when AMPI acquired Rochester.

1692. On May 2, 1969 NFO had entered into a Phase II milk supply contract with Rochester Dairy Cooperative.

1693. [Rejected]

1694. In 1969 a number of NFO nbers were selling milk to the Rochester Dairy Cooperati\..

1695. The Rochester Dairy Cooperative became a part of AMPI on October 1, 1969.

1696. Rochester Dairy Cooperative, besides operating manufacturing facilities, also distributed fluid milk products under the "Polly Meadows" brand label.

1697. The St. Charles Condensary operated a milk manufacturing plant in the geographic area encompassed in the Order 61 area in 1969.

1698. Subsequent to the AMPI acquisition of Rochester Dairy Cooperative, some NFO members who were also members of Rochester began shipping their milk to the St. Charles Condensary.

1699. In late 1969 or early 1970, NFO was negotiating to sell milk of its members to the St. Charles Condensary.

1700. In 1970, while NFO was negotiating with the St. Charles condensary, AMPI acquired the plant owned by the St. Charles Condensary and thereafter closed that plant.

1701. [Rejected]

1702. AMPI was a competitor of Marigold Foods in the sales and distribution of fluid milk products in Order 61.

1703. [Rejected]

1704. Beginning in January, 1971, AMPI and Mid-Am formed a common marketing agency for marketing their members' milk on Order 61.

1705. [Rejected] 1706. [Rejected]

1707. [See finding No. 1704, *supra*,]

1708. [Rejected] 1709. [Rejected]

1710. In 1971, AMPI licensed Marigold-Rochester to distribute fluid milk products under the "Polly Meadows" label.

1711. [Rejected] 1712. [Rejected]

1713. [Rejected] 1714. [Rejected]

1715. In late 1971 NFO began marketing milk of its members through another reload which was opened in St. Charles, Minnesota.

1716. [Rejected] 1717. [Rejected]

1718. In 1974 NFO shipped some milk of its farmer members to Packet Dairy in St. Louis from the St. Charles reload.

1719. Effective June 1, 1976 old Order 61 was abolished and the former Order 61 area became a part of new Order 68.

1720. [Rejected] 1721. [Rejected]

1722. [Rejected] 1723. [Rejected]

1724. NFO's St. Charles, Minnesota producers received a lower pay price for milk sold through that reload.

1725. [Rejected]

F. The Defendants' Alleged Response

1726. On August 11, 1971 the M-W Association wrote a letter to the Minnesota Department of Agriculture, requesting

an investigation as to the price charged for the milk being supplied to Schroeder Milk Company.

1727. [Rejected]

1728. In December, 1971 the M-W Association had a meeting.

1729. [Rejected] 1730. [Rejected]

1731. The M-W Association agreed at that meeting that the $6.20 level for Class I price milk would be maintained until further notice.

1732. In January, 1972 and for some time previously, John Gage and Mid-Am marketing personnel had been working on a written Milk Sales Agreement to use with handlers "to combat situations like NFO where they bring small amounts of milk to the market but are not willing to help handle a reserve supply of milk or to give other services that we do."

1733. [Rejected]

1734. Mid-Am in May, 1972 initiated a supply contract program for its Order 68 handlers.

1735. [Rejected]

1736. The Mid-Am contracts, mailed to its Order 68 handlers in May, 1972, were for a six-month period beginning June 1, 1972, and were automatically renewed for 12-month periods thereafter.

1737. [Rejected] 1738. [Rejected]

1739. [Rejected] 1740. [Rejected]

1741. In 1971 Mid-Am owned and operated the second largest bottling plant in the Order 68 market, known as the Nicollet plant, which had better than 10 percent of the Order 68 Class I sales.

1742. [Rejected]

G. Alleged Decline in Order 68

1743. In about November, 1973 Ewald ceased its purchases from NFO.

1744. In losing the Ewald account, NFO lost more than one million pounds of Class I in sales per month.

1745. In about March, 1974 Schroeder ceased purchases from NFO.

1746. In losing the Schroeder account, NFO lost about 3.5 million pounds of Class I sales per month.

1747. [Rejected]

1748. NFO contacted Superior, Summit Farms, Norris, and Meyer Brothers.

1749. [Rejected] 1750. [Rejected] 1751. [Rejected]

1752. NFO in 1972 had made a study of all milk manufacturing facilities available in Minnesota.

1753. [Rejected] 1754. [Rejected] 1755. [Rejected]

1756. [Rejected] 1757. [Rejected] 1758. [Rejected]

1759. [Rejected] 1760. [Rejected] 1761. [Rejected]

1762. [Rejected] 1763. [Rejected] 1764. [Rejected]

1765. [Rejected] 1766. [Rejected] 1767. [Rejected]

1768. In the spring and summer of 1974 NFO shipped some milk from Sauk Center and Sebeka, Minnesota to Idaho and Montana for manufacturing purposes.

1769. The increased hauling expenses for marketing such milk caused a drastic decline in NFO producer pay prices.

1770. NFO fell behind as much as 40 cents on its pay price.

1771. When NFO fell behind in its pay price, some if its producers left and began delivering to Cloverleaf as independents.

1772. In 1974 some of the milk from NFO's St. Charles, Minnesota producers began to be delivered to Packet Dairy at O'Fallon, Illinois.

1773. [Rejected] 1774. [Rejected]

H. Alleged Conclusions

1775. [Rejected] 1776. [Rejected]

1777. [Rejected] 1778. [Rejected]

VIII. Nebraska Order 65

1779. Federal Milk Market Order 65 was promulagated in 1968 and regulated certain handlers in the Nebraska-Western Iowa area. [This is not a finding that Order 65 was a "market" within the meaning of the antitrust laws.]

1780. [Rejected]

1781. Some milk to supply Order 65 bottlers comes from farms in eastern Nebraska, western and northwestern Iowa, southwestern Minnesota and southeastern South Dakota.

1782. [Rejected] 1783. [Rejected] 1784. [Rejected]

1785. In 1967 a new independent cheese plant, the Ravenna Cheese Company, was opened at Ravenna, Nebraska by Leroy Wadzinski.

1786. [Rejected] 1787. [Rejected]

1788. [Rejected] 1789. [Rejected]

1790. In 1970 Mid-Am merged with Central States Dairy Cooperative.

1791. In July, 1970 AMPI and Mid-Am entered into a consignment agreement providing for the coordination of their marketing of milk in Order 65.

1792. [Rejected] 1793. [Rejected]

1794. [Rejected] 1795. [Rejected]

1796. NFO had in 1970 some dairy farmer members in Nebraska, western Iowa, southwestern Minnesota and southeastern South Dakota interested in marketing milk through NFO.

1797. [Rejected] 1798. [Rejected]

1799. On December 18, 1970 Leroy Wadzinski called a meeting of interested producers to discuss putting together a milk supply from Nebraska producers for the Wichita market.

1800. The meeting was held at the Country Club in Ravenna, Nebraska and was attended by some 20 producers.

1801. [Rejected]

1802. Flynn was a member of Mid-Am's Board of Directors, third vice-president of Mid-Am, and president of Central States Dairy Cooperative at the time it merged with Mid-Am.

1803. Flynn, in his capacity of president of CSDC, signed ARSPC's articles of incorporation on behalf of CSDC and later became a director of ARSPC.

1804. Flynn was not invited to Wadzinski's meeting.

1805. Flynn, however, attended the meeting and advised the producers at the meeting not to go ahead with any plan to supply the Wichita market.

1806. Flynn spoke from prepared written materials at this meeting.

1807. [Rejected] 1808. [Rejected] 1809 [Rejected]

1801. [Rejected] 1811. [Rejected]

1812. On December 31, 1970 a group of 13 NFO members shipping through Mid-Am in Nebraska submitted termination notices to Mid-Am management.

1813. Mid-Am refused to honor the notices because they were one day late.

1814. [Rejected]

1815. In December, 1971 another group of 14 or 15 NFO producers in Nebraska terminated their Mid-Am Grade A contacts effective May 1, 1972.

1816. In May, 1972 NFO began marketing some of its members Nebraska Grade A milk to Midwest Creamery in Ponca City, Oklahoma and to local cheese plants in Nebraska

1817. NFO Nebraska operating costs were as high as $1.00 per cwt. when milk was going to Oklahoma.

1818. NFO was not able to return a competitive pay price to its Nebraska members for marketing their milk to Midwest Creamery and pooling it on Order 106.

1819. In September, 1973 Mid-Am proposed a raw milk sales agreement to all handlers in Nebraska.

1820. The Mid-Am contract introduced in Nebraska in 1973 was a one-year contract which was automatically renewed unless terminated 90 days before the anniversary date.

1821. The Mid-Am contract called for the handler to commit to purchase a given volume or percentage of its requirements from Mid-Am.

1822. [Rejected] 1823. [Rejected]

1824. At least four Order 65 distributing plant handlers signed Mid-Am contracts for 95 per cent of their requirements on or after September 15, 1973.

1825. In December, 1973 the United States filed suit against Mid-Am under the antitrust laws.

1826. In June, 1974 Ravenna Cheese Company began to ship Grade A milk to Robert's Fairacres Dairy at Grand Island, Nebraska.

1827. Robert's Fairacres purchased Grade A milk from non-Mid-Am sources in 1974.

1828. [Rejected] 1829. [Rejected]

1830. Marketing problems in Minnesota, Wisconsin and elsewhere diverted Berkhahn's efforts from the Nebraska Order 65 area during 1971 through 1975.

1831. [Rejected] 1832. [Rejected] 1833. [Rejected]

1834. [Rejected] 1835. [Rejected]

IX. Kansas And Northwest Missouri Orders 73, 71 And 64

A. AMPI And Mid-Am Alleged Cooperation

1836. Federal Milk Marketing Order 73 encompassed the geographical area in and around Wichita, Kansas. [This is not a finding that Order 73 was a "market" within the meaning of the antitrust laws.]

1837. Each year from 1969 to 1972, AMPI pooled at least 96 per cent of all milk pooled on Wichita Federal Order 73.

1838. MPI, later AMPI, charged a 50 cent Class I premium in Wichita beginning in fall of 1967 and continuing until at least 1972.

1839. Neosho Valley Order 71 encompassed the southeastern part of Kansas. [This is not a finding that Order 71 was a "market" within the meaning of the antitrust laws.]

1840. Each year from 1969 to 1972, AMPI pooled about 25 per cent of all milk pooled on Neosho Valley Order 71.

1841. Each year from 1969 to 1972, Mid-Am pooled about 75 per cent of all milk pooled on Neosho Valley Order 71.

1842. Mid-Am and AMPI both charged 50 cent premium on Class I milk sold to Neosho Valley Order 71 handlers from September, 1967 to at least 1970.

1843. Kansas City Order 64 encompassed the northeastern part of Kansas and the northwestern part of Missouri. [This is not a finding that Order 64 was a "market" within the meaning of the antitrust laws.]

1844. In 1969 Mid-Am acquired three dairy farmers' cooperatives in the Kansas City area.

1845. Each year from 1969 to 1975 Mid-Am pooled about 80 per cent of all milk pooled on Kansas City Order 64.

1846. Mid-Am charged a 50 cent premium in Kansas City beginning in fall 1967.

1847. Each year from 1969 to 1975, about two per cent of all milk pooled on Order 64 was AMPI milk.

1848. [Rejected] 1849. [Rejected]

1850. [Rejected] 1851. [Rejected]

1852. In September, 1969 Washington County Cooperative merged with MPI.

1853. [Rejected]

1854. Mid-Am and MPI, later AMPI, had Class I base plans in effect in Kansas.

1855. Mid-Am and MPI exchanged information about the net prices each was paying its farmer members in the Neosho Valley and Kansas City Federal Orders.

1856. [Rejected]

1857. On June 1, 1970 Mid-Am and AMPI entered into a consignment agreement under which Mid-Am consigned to AMPI for sale any Mid-Am member milk delivered to Wichita Order 73 bottlers.

1858. On July 13, 1970 AMPI and Mid-Am entered into two separate consignment agreements under which AMPI consigned to Mid-Am for sale AMPI member milk delivered to Kansas City Order 64 and Neosho Valley Order 71 handlers.

1859. Mid-Am and AMPI were both members of the Milk Sales Cooperative Federation (MSCF) which announced prices at which MSCF members would sell milk in the Kansas City Federal Order.

1860. Mid-Am marketed AMPI milk in the Kansas City market under the consignment agreement dated July 13, 1970.

1861. [Rejected] 1862. [Rejected] 1863. [Rejected]

1864. [Rejected] 1865. [Rejected]

B. AMPI And Mid-Am Alleged Coercion Of Buyers And Producers

1. Steffen's And Hyde Park In Wichita

1866. Hyde Park Dairy and Steffen's Dairy were two of the bottlers regulated by Wichita Order 73.

1867. In 1970 Steffen's Dairy in Wichita was buying its full requirements of raw milk from AMPI.

1868. AMPI operated a milk bottling plant at Hillsboro, Kansas prior to June, 1970.

1869. [Rejected]

1870. Steffen's did not like the fact that it had to pay AMPI a 50 cent per cwt. premium on Class I milk because it had to compete with AMPI's bottling plant.

1871. In the spring of 1969, NFO had some members in and around Wichita, Kansas who were prepared to ship milk through NFO if NFO could get them a market.

1872. [Rejected]

1873. In spring or summer, 1970 Al Scott of NFO offered to sell Grade A milk to Steffen's Dairy.

1874. L. A. Deck was the executive vice-president in charge of operations of Steffen's Dairy in 1970.

1875. [Rejected] 1876. [Rejected]

1877. Steffen's Dairy continued to buy its full requirements of raw milk from AMPI in and after 1970.

1878. Steffen's Dairy never bought milk from NFO.

1879. [Rejected]

1880. NFO's Wichita, Kansas area members never shipped milk through NFO.

1881. In late 1970 Hyde Park Dairy told Wadzinski of Ravenna Cheese Company, Ravenna, Nebraska, that Hyde Park would buy milk from some Nebraska farmers if Wadzinski could assemble one million pounds of milk per month.

1882. [See finding 1799, *supra.*]

1883. [See finding 1800, *supra.*]

1884. Wadzinski told Nebraska producers that the Wichita Order 73 blend price was about 40 cents per cwt. greater than the Nebraska Order 65 blend price they were currently receiving.

1885. [Rejected]

1886. [See finding 1805, *supra.*]

1887. [Rejected]

1888. NFO commenced marketing the milk of NFO producers to Hyde Park Dairy in August, 1973.

2. Page Milk In Neosho Valley

1889. Prior to November, 1972 Page Milk Company at Coffeyville, Kansas, was regulated by Neosho Valley Order 71.

1890. Page Coffeyville was the major Order 71 handler.

1891. Page Milk Company operated a milk bottling and evaporating plant at Coffeyville, Kansas, from the 1930's to at least 1974.

1892. The Page Coffeyville plant was regulated by Neosho Valley Order 71 until November, 1972.

1893. The Page Coffeyville plant became regulated by Oklahoma Order 106 in November, 1972 and remained regulated by that Order until at least 1974.

1894. From 1966 to June, 1973 Page Coffeyville bought most of its Grade A milk from Mid-Am (and its predecessors) and AMPI (and its predecessors).

1895. Over the years, Page Coffeyville also bought some milk from Carnation's Tulsa plant.

1896. From March through September, 1970 Page Coffeyville also bought some NFO Grade A milk diverted by Midwest Creamery.

1897. Page Coffeyville also bought manufacturing grade milk.

1898. Jim Page was the manager of the Page Coffeyville plant from 1937 until at least 1974.

1899. Page Milk Company also operated a milk bottling plant at Tulsa, Oklahoma, from 1961 to November, 1972.

1900. The Page Tulsa plant was regulated by Oklahoma Metropolitan Order 106 from the late 1960's until October 15, 1972, at which time it discontinued its bottling operation in Tulsa.

1901. Page Tulsa bought its full requirements of Grade A milk from AMPI from at least 1969 to October, 1972, with the exception of several months from spring to fall, 1970, when it purchased some milk from Carnation Company's Tulsa plant and some NFO milk diverted by Midwest Creamery.

1902. Bill Page was the manager of the Page Tulsa plant from 1963 until at least 1974.

1903. Jim Page was responsible for procurement of Grade A milk for both the Tulsa and Coffeyville plants.

1904. [Rejected]

1905. In 1966 and 1967, Page Coffeyville had been receiving from MPI most of its monthly requirements of approximately three and one half million pounds to approximately four million pounds of Grade A milk, except for a million pounds bought from Producers Creamery and others.

1906. [Rejected]

1907. Shortly after January, 1968 Producers Creamery began supplying more milk to Page Coffeyville and MPI began supplying less.

1908. [Rejected] 1909. [Rejected] 1910. [Rejected]

1911. Beginning March, 1970 Page Coffeyville bought Missouri Grade A milk diverted from Midwest Creamery that had been supplied by NFO to Midwest.

1912. On or about July 3, 1970 Page Coffeyville entered into a contract with NFO member producers to sell Grade C (manufacturing grade) milk to Page Coffeyville from June 1, 1970 to November 30, 1970.

1913. [Rejected] 1914. [Rejected] 1915. [Rejected]

1916. [Rejected] 1917. [Rejected]

1918. On August 6, 1970 Page, as requested by AMPI and Mid-Am, presented a supply proposal to them covering both Tulsa and Coffeyville.

1919. In his August 6, 1970 supply proposal, Page requested that Mid-Am and AMPI agree to permit him to purchase cheaper milk from Carnation, for example, whenever he desired.

1920. On August 28, 1970 AMPI proposed to supply all of Page Tulsa's Grade A requirements pursuant to the membership and consignment agreements between AMPI and Mid-Am and notified Page that Mid-Am would make an offer to supply Page Coffeyville.

1921. AMPI sent Mid-Am a copy of AMPI's August 28, 1970 letter to Page.

1922. On September 1, 1970 Mid-Am proposed, in accordance with consignment agreements between AMPI and Mid-Am, to supply all of Page Coffeyville's requirements, with the exception of those presently being supplied by Page's own Grade C producers.

1923. On September 9, 1970 Page repeated its proposal that it be permitted to buy cheaper milk from Carnation, for example, whenever it desired.

1924. On September 17, 1970 Mid-Am responded to Page's September 9, 1970 letter, requesting comment and explanation of that letter.

1925. On September 21, 1970 Page Coffeyville responded to Mid-Am's letter of September 17, 1970 and agreed to commit itself to an agreement with Mid-Am.

1926. [Rejected] 1927. [Rejected]

1928. In March or April, 1971 Scott of NFO tried unsuccessfully to sell one load of Grade A milk a month to Page.

1929. [Rejected] 1930. [Rejected] 1931. [Rejected]

1932. [Rejected] 1933. [Rejected] 1934. [Rejected]

1935. In July, 1973 Page Coffeyville began purchasing part of its Grade A requirements from NFO.

1936. Page Coffeyville bought Grade A milk from NFO at 10 cents per cwt. under the prevailing premium until April, 1974, when a new pricing basis was established.

3. Alleged Pressure In Kansas City

1937. In 1971 NFO began marketing the milk of some NFO member dairy farmers in and around Clinton, Missouri, just south of Kansas City, by shipping their milk to the Springfield reload.

1938. Hawthorn-Mellody, Inc., a propietary corporation, had a bottling plant in Kansas City Order 64.

1939. NFO contacted Hawthorn-Mellody in early 1971 to see whether it would buy NFO's Jefferson City reload milk at its Kansas City plant.

1940. [Rejected] 1941. [Rejected]

1942. Fairmont Foods had a plant in Kansas City Order 64.

1943. Fairmont Foods Company operated bottling plants in various cities in the Midwest.

1944. [Rejected] 1945. [Rejected] 1946. [Rejected]

1947. [Rejected] 1948. [Rejected] 1949. [Rejected]

1950. [Rejected]

1951. NFO did not begin selling milk in Order 64 until mid-1974. By 1977 NFO sold some Kansas and Missouri NFO members' milk to three Order 64 plants: Meyer Dairy at Bashore, Kansas; Beatrice at St. Joseph, Missouri; and Beatrice at Topeka, Kansas.

C. Base Plans

1952. [Rejected]

D. Recent Alleged AMPI Full Supply Tactics

1953. [Rejected]

E. Conclusions

1954. [Rejected] 1955. [Rejected] 1956. [Rejected]

X. Alleged Suppression of Evidence

A. The Little Rock Bonfire

1957. [Rejected] 1958. [Rejected] 1959. [Rejected]

1960. [Rejected] 1961. [Rejected]

1962. Joe Murphey destroyed at least twelve documents from his AMPI Little Rock files.

1963. [Rejected]

1964. Several boxes of Dave Parr files were removed from the AMPI Little Rock office in spring 1971. The documents in those files related to Parr's personal financial matters, political matters, and possibly other matters.

1965. Lynn Elrod removed documents from his office files in spring 1971.

1966. [Rejected]

1967. The basic function of David Parr of the AMPI Little Rock, Arkansas divisional office was to do AMPI corporate planning.

1968. ADI had a "Think Tank" composed of MPI, later AMPI, personnel, agricultural economists, and university professors.

1969. Most of the MPI/AMPI personnel involved in the "Think Tank"—Dave Parr, Tom Townsend, Lynn Elrod and Joe Murphey—worked out of the Little Rock, Arkansas divisional office.

1970. [Rejected] 1971. [Rejected] 1972. [Rejected]

B. Alleged Suppression Elsewhere In AMPI

1973. [Rejected] 1974. [Rejected] 1975. [Rejected]

1976. [Rejected]

C. Mid-Am's Alleged Attempt To Destroy Evidence

1977. [Rejected] 1978. [Rejected] 1979. [Rejected]

D. AMPI And Beatrice Allegedly Concoct Fictitious Evidence

1980. On August 31, 1971 AMPI (and PMPC) sued NFO in Wisconsin State Court, alleging that NFO had induced farmers to breach their AMPI (and PMPC) contracts.

1981. [Rejected] 1982. [Rejected]

E. AMPI Allegedly Hides The Ball

1. The Complete AMPI Minutes Were Allegedly Hidden, The "Official" Ones Allegedly Sanitized

1983. NFO on August 19, 1971 requested, under F. R. Civ. P. 34, that AMPI produce all minutes of Board of Directors meetings.

1984. AMPI Chicago office secretary Marge Reynolds attended, took shorthand notes at and later transcribed her notes of AMPI Board of Directors meetings.

1985. [Rejected] 1986. [Rejected] 1987. [Rejected]

2. 1972 Document Reconnaissance And Production

1988. During February, 1972 NFO conducted document reconnaissance at AMPI's San Antonio, Texas, headquarters.

1989. When Harold Nelson ceased being the general manager of AMPI, he left certain files in AMPI's possession.

1990. Prior to the time of the February, 1972 reconnaissance of AMPI files and documents in San Antonio, Texas, Stuart H. Russell was informed that there were Harold Nelson files located in a closet in AMPI headquarters.

1991. Neither the existence nor the location of those particular Nelson files was made known to the NFO reconnaissance team.

1992. In August, 1972 AMPI attorney Stuart Russell instructed Roger Hooper, an AMPI San Antonio, Texas home office employee, to remove three boxes of the Harold Nelson files from the closet in AMPI's headquarters to an outside storage facility.

1993. The three boxes of Nelson files were removed from the San Antonio office of AMPI in August, 1972 and stored in an outside mini-warehouse facility under the name of Roger Stewart, another AMPI employee. All these files were eventually produced during the Joe Rose deposition.

1994. Prior to the time of the NFO reconnaissance in February, 1972 at the AMPI headquaters in San Antonio, Texas some files of Bob Lilly, an AMPI employee at San Antonio, were moved from the office where they were normally maintained and placed in a closet.

1995. NFO counsel were not shown these Lilly files.

1996. During the February, 1972 reconnaissance of the AMPI headquarters, NFO counsel were taken to Lilly's office and were told that for all practical purposes he had no AMPI documents.

1997. Subsequent to the time of the original NFO reconnaissance in February, 1972 of AMPI headquarters at the GPM Life Building in San Antonio, Texas, the Lilly files were returned to the AMPI offices at the GPM Life Building in San Antonio, Texas, where they were normally maintained.

1998. During the reconnaissance at AMPI's corporate headquarters in February, 1972 NFO counsel requested access to the files maintained by Joe Murphey.

1999. NFO production request No. 2056 called for the production of "the correspondence files prepared or maintained by or under the direction of Mr. Joe Murphey." AMPI produced only documents from the files of Joe Murphey during the June and July, 1972 document production period which had been shipped from AMPI's Little Rock office to AMPI's San Antonio office. All of the Joe Murphey files had not at that time been shipped to San Antonio.

2000. By late summer 1972, however, at least 31 boxes of Joe Murphey's files had been shipped from Little Rock and were in AMPI's headquarters in San Antonio, Texas.

2001. At some time in 1972, the 31 boxes of Joe Murphey's files were removed from AMPI's headquarters in San Antonio, Texas and stored in the mini-warehouse under a name other than AMPI. All 31 boxes were eventually produced to all parties in the fall of 1973.

3. The Isham List Of Irregularities

2002. Robert Isham, who was AMPI's controller from 1969 to mid-1972, was one of AMPI general manager Harold Nelson's principal assistants at that time.

2003. In about January, 1972 Isham prepared for AMPI employee George Mehren a "list of irregularities" having to do

with Harold Nelson's management of AMPI.

2004. NFO Exhibit 162 is a copy of paragraphs 4 to 29, inclusive, of the Isham prepared "list of irregularities."

2005. Isham, Mehren and AMPI president John Butterbrodt had copies of NFO Exh. 162 in 1972.

2006. NFO Exhibit 162 was not produced by AMPI to NFO during discovery in this case. It was introduced in evidence during the trial of *United States* v. *Russell*, in September, 1975, during the testimony of Robert O. Isham.

2007. [Rejected]

F. The McDougal Incident

2008. [Rejected]

G. Mid-Am and ARSPC Allegedly Trump Up Testimony About ARSPC

2009. On November 8, 1971 Gary Hanman of Mid-Am wrote a letter to Joe Westwater, the general manager of ARSPC, who was about to be deposed by NFO.

2010. [Rejected] 2011. [Rejected] 2012. [Rejected]

2013. Westwater received Hanman's November 8, 1971 letter on November 10, 1971.

2014. [Rejected]

2015. By letter dated November 11, 1971, Westwater responded to Hanman's November 8 letter.

2016. [Rejected]

H. Conclusion

2017. [Rejected]

PHASE II CONCLUSIONS OF LAW

While hundreds upon hundreds of pages of briefs were filed in connection with Phase II of this case, the conclusions of law

proposed by NFO, those proposed jointly by Mid-Am, AMPI, and CMPC, and those separately proposed by ARSPC were mercifully short and concise.

The parties are agreed, however, only in regard to a conclusion of law which would state that this Court has jurisdiction of the subject matter or NFO's counterclaim. The rationale of our determination of the remaining legal questions presented in Phase II of this case can be most clearly reflected by a formal rejection of all conclusions of law proposed by NFO, except the portion of the conclusion proposed in paragraph 1 of NFO's proposed conclusions relating to the subject matter jurisdiction of this Court and by keying our formal conclusions of law to those jointly proposed by Mid-Am, AMPI, and CMPC as we believe those proposed conclusions should be modified.[29]

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[29] It is not necessary to deal separately with the 16 conclusions of law proposed by ARSPC. Paragraph 1 related to subject matter jurisdiction and is obviously covered. Paragraphs 2 to 9 and 12 relate to various aspects of ARSPC's claim of exemption under the Capper-Volstead Act, Section 6 of the Clayton Act, and under the rationale of *Sunkist Growers, Inc.* v. *Winckler*, 370 U.S. 19 (1962), particularly as *Sunkist I* was recently applied by the Second Circuit in *Fairdale Farms, Inc.* v. *Yankee Milk, Inc., et al.*, Nos. 80-7028, 7034, 7036 (2nd Cir. December 9, 1980). Our formal conclusion of law No. 7 states our view that we need not and do not need to reach the various antitrust exemption questions presented in Phase II of this case.

By the same token, ARSPC's proposed conclusions that "the evidence fails to establish that ARSPC conspired to restrain trade or monopolize in violation of Sections 1 and 2 of the Sherman Act" (¶ 10); that ARSPC has not violated Section 2 of the Sherman Act (¶ 11); that "the evidence presented by NFO fails to show any right to relief against ARSPC (¶ 13); and that "NFO has failed to establish a relevant product market" (¶ 14) or "a relevant geographic market (¶ 15) are covered by appropriate paragraphs of our formal conclusions. And finally, ARSPC Paragraph 16 relating to venue is covered by paragraph 3 of our formal findings.

The adoption of such a procedure will show, for example, that NFO's proposed conclusions of law in regard to alleged violations of Section 1 of the Sherman Act as contained in various of the conclusions of law proposed by NFO are both expressly rejected by a formal statement of record and by this Court's formal conclusion 8 which expressly states that "NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish, that defendants, or any of them, combined or conspired to restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1)."

Accordingly, we expressly reject for the record all 36 paragraphs of the conclusions of law proposed by NFO in connection with Phase II of this case, excepting only that portion of paragraph 1 relating to the subject matter jurisdiction of this Court.

We make and state the following conclusions of law for Phase II of this case:

1. This Court has jurisdiction of the subject matter of this action.

2. This Court has *in personam* jurisdiction as to NFO, AMPI and Mid-Am. For purposes of determining the facts, we have assumed that this Court also has *in personam* jurisdiction as to CMPC and ARSPC.

3. Under our view of the case, it is not necessary to determine whether venue herein is improper as to CMPC and ARSPC.

4. NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish, that one relevant geographic market in this case is the composite of the 27 Federal Milk Market Order areas located in the States of Wisconsin, Minnesota, Nebraska, Iowa, Illinois, Missouri, Kansas, Oklahoma, Arkansas and Texas.

5. NFO failed to carry the burden of proving, and the evidence adduced did not otherwise establish, that each feder-

al market order in the ten states listed above constituted a relevant geographic market in this case.

6. It is not necessary to decide whether the relevant product/services market in this action consists of Grade A and Grade B (manufacturing grade) milk and all services of raw milk marketers associated with the procurement and marketing of both of these grades of milk or whether the relevant product/market in this case is the business of marketing raw Grade A milk. We need to and therefore conclude only that NFO's evidence is insufficient to prove the latter.

7. It is unnecessary to reach the question of whether AMPI, Mid-Am, CMPC and ARSPC were entitled to the exemptions and immunities granted cooperative milk marketing associations by the Capper-Volstead Act (7 U.S.C. § 291).

8. NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish that defendants, or any of them, combined or conspired to restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

9. NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish that defendants, or any of them, attempted to monopolize the marketing of milk in violation of § 2 of the Sherman Act (15 U.S.C. § 2).

10. NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish that defendants, or any of them, monopolized the marketing of milk in violation of § 2 of the Sherman Act (15 U.S.C. § 2).

11. NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish that defendants, or any of them, combined or conspired to monopolize the marketing of milk in violation of § 2 of the Sherman Act (15 U.S.C. § 2).

12. NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish that defendants, or any of them, instituted litigation in bad faith against

NFO in violation of Sections 1 or 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

13. NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish that defendants, or any of them, foreclosed NFO from access to any dairy farmers or milk markets in violation of Sections 1 or 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

14. NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish that defendants, or any of them, eliminated competition between themselves, or between any one or more of them with other persons, in violation of Sections 1 or 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

15. NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish that defendants, or any of them, wilfully acquired and maintained monopoly power in any relevant market in violation of § 2 of the Sherman Act (15 U.S.C. § 2).

16. It is not necessary to reach the question of whether NFO may not have been injured in its business or property on account of violations of Section 1 or 2 of the Sherman Act (15 U.S.C. §§ 1, 2,) by defendants, or any of them.

17. It is not necessary to reach the question of whether NFO may not have standing to maintain this action.

18. It is not necessary to reach the question of whether NFO's "reduced price" and "market penetration" damage claims may be speculative, conjectural and not legally permissible.

19. NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish, that it is entitled to recover the attorneys' fees and costs of defending the claims instituted against it herein.

20. NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish, that it is enti-

tled to recover the attorneys' fees and costs expended in prosecution of its counterclaim herein.

21. NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish, that it is entitled to injunctive relief against the defendants in this action.

22. It is not necessary to reach the question of whether the relief afforded to the United States in its suits against AMPI and Mid-Am renders NFO's claims for injunctive relief herein moot as to said parties.

23. NFO failed to carry the burden of proving, and the evidence adduced does not otherwise establish, that it is entitled to the relief of divestiture in this action.

An appropriate order therefore will be entered in regard to Phase II of this case which will direct the Clerk to enter judgment against NFO in regard to its Phase II counterclaim and in favor of Mid-Am, AMPI, CMPC, and ARSPC.

I. PHASE III FINDINGS OF FACT[30]

A. Background And Parties

1. This is a suit under Sections 4 and 16 of theClayton Act, 15 U.S.C. §§ 15 and 26, and 28 U.S.C. § 1337, wherein the Phase III defendants, The National Farmers Organization, (hereinafter "NFO") and nineteen NFO members and/or employees, are charged with violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and certain provisions of the Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2303(c), (e), and (f).

2. Counterclaimant Associated Milk Producers, Inc. (hereinafter "AMPI") was incorporated in 1969 under the Agricultural Cooperative Marketing Act of the State of Kansas

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[30] Paragraphs 1 to 752 of our Phase III findings of fact are keyed to the findings of fact proposed by AMPI.

with its principal place of business in San Antonio, Texas. AMPI's membership includes dairy farmers located in many midwestern states including Wisconsin and Illinois.

3. No question is presented in regard to venue or this Court's *in personam* jurisdiction over the National Farmers Organization or the individual Phase III defendants.

4. Phase III defendant Ricardo A. Avila was Assistant Director of the NFO Dairy Commodity Department and a former member of NFO.

5. Phase III defendants Tom Conrad, Jimmie Fuller, Glen Knode, Clarence Korte, Basil Michaels, Howard Murray, Willis Rowell, Frank Schwarzer, John Wahlin and DeVon Woodland are farmers and NFO members.

6. Counterclaim defendant Edwin Graf is director of the NFO Dairy Commodity Department.

7. Phase III defendant Rhea Hackler was a member of the NFO Board of Directors unitl 1974 and was a dairy farmer until 1965. He was in chargeof the NFO Dairy Department in Missouri and was directly responsible to Al Scott.

8. Phase III defendant Oliver Hanna was an NFO Marketing Area Dairy Representative in Madison, Wisconsin.

9. Phase III defendant Erhard Pfingsten is a farmer, was an NFO Board member until December, 1971, and former NFO Vice-President.

10. Phase III defendant Gordon Shafer was assistant to NFO President Staley and has been an NFO member since 1955.

11. Phase III defendant Allen Skroch is a farmer, NFO Board member, and NFO employee.

12. Phase III defendant Oren Lee Staley, President of NFO from 1955 until 1979, is a farmer.

13. Phase III defendant Glenn Utley is a farmer and a part-time employee of NFO.

14. NFO is a not-for-profit membership corporation organized in 1955 under the laws of the State of Iowa and has its national office at Corning, Iowa.

15. NFO's original purpose was to be a protest movement to promote legislation and other governmental action favorable to farmers.

16. In 1957 the NFO members authorized development of a program of collective bargaining for farmers to put farmers in a position of sufficient economic strength to deal effectively with the concentrated power of buyers and processors of farm products.

17. NFO is a national membership organization with State, Congressional district, andcounty units throughout most of the United States.

18. NFO is presently organized in forty-eight states with marketing programs in dairy, livestock, grain, edible beans and potatoes.

19. NFO county units engage in controlling new members in NFO, a procedure which is referred to as "organizing."

20. NFO county units are required to conform to general NFO policies.

21. The NFO Reporter, prepared and published monthly by the NFO and sent to NFO members and many other subscribers, is the official voice of NFO, and has a circulation of about 220,000.

22. The basic premise of the NFO collective bargaining program is that the existing farm marketing system is unacceptable because the individual farmer has insufificient bargaining strength to deal with the concentrated power of the firms to which he sells his product.

23. NFO seeks to combine the production of farmers under collective bargaining agreements in a sufficient quantity so that the marketing system cannot meet its requirements without turning to NFO.

24. It is NFO policy that its programs must be nationwide and must reach all major commodities in order to be fully effective.

25. NFO has collective bargaining programs for all major agricultural commodities and many minor ones.

26. [Rejected][31]

27. Not all NFO members who sell Grade A milk participate in an NFO dairy program.

28. Marketing has never been NFO's principal activity; collective bargaining for a higher commodity price level is its principal activity.

29. [Rejected] 30. [Rejected] 31. [Rejected]

32. One of the factors NFO employees are directed to keep in mind in evaluating any transaction is whether that transaction will provide NFO with a bigger bargaining lever.

33. [Rejected]

34. To implement the NFO collective bargaining program, NFO and its members enter into a Membership Agreement, which covers all commodities and has a three year term.

35. Article VI of the NFO Membership Agreement states:

> No contract consummated with a processor shall be effective or binding until it has been ratified by a two thirds' vote of members in a marketing area who have signed contracts with the NFO for the commodity, attending a meeting called for that purpose, and has been approved by the Board of Directors of the NFO. . . . If a marketing procedure is formulated for a marketing area, it will require the same ratification as contracts with processors.

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[31] We use "[Rejected]" in Phase III in the same way "[Rejected]" was used and explained in Phase I and Phase II.

36. Artricle VII of the NFO Membership Agreement states:

> Until such time as a contract has been consummated with the processor for a commodity I own or control in accordance with the provisions of this agreement; or until a marketing procedure has been established for a commodity and ratified in accordance with the terms of this agreement, a member shall be free to market his commodity as he chooses. . . . When a contract has been consummated in accordance with the terms of this agreement covering a member's commodity, and he sells this commodity specified by the agreement, the member shall be assessed 10% of the gross sale of the commodity for liquidated damages.

37. [Rejected] 38. [Rejected]

39. [Rejected] 40. [Rejected]

41. If an NFO member does not terminate his agreement within a specified 10-day period, his Membership Agreement is automatically renewed for another three-year period.

42. [Rejected]

43. Even though NFO members have not paid their dues since 1958, they are still considered members by NFO.

44. NFO has sometimes used supplemental agreements for members participating in NFO's voluntary programs.

45. The NFO obtains the authority to bargain for and make sales of its members' milk when the member signs a supplemental milk sales agreement.

46. [Rejected]

B. NFO Programs And Policies Before 1969

47. [Rejected] 48. [Rejected] 49. [Rejected]

50. [Rejected] 51. [Rejected] 52. [Rejected]

53. In a speech between April and August of 1967, Oras Kanerva, Assistant Dairy Department Directors, said: ". . . the coops control 85% of the marketed milk and they still

haven't been able to realize that they can bargain together and that they can affect the price. . . . We cannot go direct to the buyer, that is the wholesale buyer of these commodities, that is we got to and we must work through our coops and our small independent buyers, so consequently you and I have got the ungrateful task of being the burr under the saddle. And we're a might nasty burr."

54. [Rejected] 55. [Rejected]

56. [Rejected] 57. [Rejected]

58. From at least 1961 until the Spring of 1969, NFO promoted and encouraged the formation of a common marketing agency to be made up of all of the major dairy cooperative organizations in the middle United States or, if possible, the entire United States.

59. [Rejected]

60. The purpose of the common marketing agency urged by NFO was to form an organization large enough that the milk buyers could not fill their needs without buying from that agency.

61. In and prior to early 1969 Ed Graf, Director of the NFO Dairy Department, stated in connection with the proposed common marketing agency that there should be just one voice for all dairy farmers.

62. [Rejected]

63. In or about 1961 NFO conducted approximately three conferences of cooperative leaders for the purpose of explaining its proposed marketing agency in common.

64. A number of major midwest dairy cooperatives and others attended these meetings, but none of the cooperatives undertook to form a marketing agency in common.

65. As a result of the failure of dairy cooperative leaders to act on NFO's proposals, NFO undertook an effort to sign dairy farmers as NFO members.

66. [Rejected]

67. During the period from 1960 to 1969 NFO also encouraged cooperatives to merge into larger regional units which would be more efficient and have more bargaining power to deal with the large regional and national milk buyers.

68. NFO believed that some dairy cooperative mergers were necessary because the organizations lacked sufficient size to bargain effectively.

69. NFO publicly took credit for the trend toward mergers of dairy cooperatives.

70. [Rejected] 71. [Rejected] 72. [Rejected]

73. In some instances NFO members constituted a majority of the Board of Directors of a dairy cooperative.

74. [Rejected]

75. NFO began attempting to obtain signed Master Contracts for milk in 1962.

76. Master Contracts were presented to cooperatives and proprietary plants that were the first buyers of producer milk.

77. It was the goal of NFO in 1963 to sign such contracts with buyers of all commodities to stabilize agricultural prices.

78. NFO offered Master Contracts for both Class I fluid milk buyers and for buyers using milk for manufacturing purposes.

79. The NFO Master Contract for Class I milk would not take effect until NFO had obtained similar contracts with bottlers who bottled an amount of milk equal to 60% of the production in Michigan, Ohio, Indiana, Illinois, Wisconsin, Minnesota, Iowa, Missouri, Kansas and Nebraska.

80. The NFO Master Contract for manufacturing grade milk provided that it would not be operative until NFO had obtained similar contracts with processors who processed an amount of milk equal to 60% of the total pounds of milk manu-

factured in the entire United States as well as processors who bottled an amount of milk equal to 60% of the milk bottled in the ten state area.

81. [Rejected]

82. It was a goal of NFO in the 1960's to obtain control of 60% of the average annual number of pounds of milk manufactured in the entire United States.

83. [Rejected]

84. NFO advised NFO members to ship to plants that had signed an NFO Master Contract.

85. NFO members moved large volumes of milk out of the plants to which they had been shipping.

86. NFO advised members to move their milk to plants that had signed such Master Contracts and then approached the plants which members had abandoned and asked them to sign Master Contracts to get their milk back.

87. [Rejected]

88. In or about 1965 NFO again invited dairy cooperative leaders from 14 states to a meeting to discuss formation of a common marketing agency.

89. At that time Staley and Shafer met with leaders of Omaha-Nebraska Cooperative, Pure Milk Association, Twin City Milk Producers, Pure Milk Association of Kansas City, Sioux Valley Milk Producers, and Des Moines Cooperative Creamery at the Fort Des Moines Hotel in Des Moines, Iowa.

90. Staley stated at that meeting that NFO wanted all of the cooperatives present to join a marketing agency in common, that NFO would bargain with cooperatives for the price of the producers' milk, and that the cooperatives would contine to do the processing.

91. [Rejected]

92. NFO intended to enter into Master Contracts with the members of the common marketing agency.

93. [Rejected]

94. With the assistance of NFO a common marketing agency called Nationwide Milk Producers, Inc., made up of cooperatives in Minnesota and Wisconsin was formed in about 1964.

95. NFO envisioned that the Nationwide member cooperatives would all sign Master Contracts and sell their raw milk and dairy products through the marketing agency in common.

96. [Rejected]

97. Nationwide was viewed as an intermediate step toward implementation of the NFO Master Contracts.

98. In March of 1967 NFO conducted a dairy holding action lasting for at least 11 or 12 days.

99. [Rejected]

100. An objective of the 1967 Holding Action was to raise milk prices by one dollar per hundred weight.

101. In the milk holding action of 1967 NFO encouraged all members to withhold milk regardless of whether the members had contracts with cooperatives.

102. Prior to the 1967 NFO Milk holding action, NFO disseminated instructions to its membership stating that NFO members and representatives may solicit non-members to join NFO and then, after having signed a membership agreement, to support the NFO efforts.

103. [Rejected]

104. The Department of Justice obtained a temporary injunction which ended the 1967 holding action.

105. Immediately after the dairy holding action, NFO conducted its so-called "Store and Hold" program, which was a continuation of the holding action, by having members' milk made into hard product and stored until NFO determined that it should be sold.

106. The NFO Store and Hold program was an intermediate step to reach NFO's goal of procuring Master Contracts.

107. NFO, in 1967, desired to control enough of milk going to particular plants to be able to negotiate effectively with them.

108. NFO dairy farmer members signed their milk into the NFO Phase II Store and Hold program by executing NFO Form 7-3-39, "Milk Processing and Sales Agreement," and NFO Form 7-3-38, "Authorization to Plant Operator."

109. The NFO Form 7-3-38 entitled "Authorization to Plant Operator," authorized the purchaser of NFO member milk to deduct 3 cents from the price paid to the signatory NFO member for each hundred pounds of milk and to send the 3 cent checkoff to the NFO, Inc., Corning, Iowa and also informed the purchaser of the agreement between NFO and its member.

110. The Form 7-3-39 did not give NFO the authority to negotiate for the sale of all of a member's dairy production but only so much as he would deliver to the plant.

111. The sales authority was intended to be used for bargaining purposes.

112. The formation of a marketing agency in common was a purpose of the Phase II Store and Hold Dairy Program.

113. [Rejected]

114. The Store and Hold program was unsuccessful.

C. 1969 Meetings Between NFO And Cooperative Leaders

115. In or about 1964, a group of Midwestern dairy cooperatives, including Milk Producers, Inc., formed a common marketing agency called Associated Dairymen, Inc.

116. [Rejected] 117. [Rejected] 118. [Rejected]

119. NFO took credit for setting in motion the events which brought about the discussions concerning regional cooperatives in the Midwest.

120. NFO encouraged cooperatives to join the new regional organization which was to become AMPI until about 1969.

121. NFO wanted to enter into a supply contract with the new regional cooperative.

122. In or about October of 1968, representatives of NFO and of cooperatives considering participation in the regional cooperative met in Kansas City, at the suggestion of NFO, to discuss their signing milk supply contracts with NFO.

123. At this meeting the NFO representatives proposed a contract whereby NFO would agree on behalf of its members to supply milk to the proposed regional cooperative.

124. The Kansas City meeting did not result in any commitment by the group representing the proposed regional cooperative.

125. [Rejected] 126. [Rejected]

127. In April, 1969, representatives of NFO again met with the representatives of the proposed regional cooperative at the NFO offices in Corning, Iowa.

128. NFO again offered to supply the proposed regional cooperative large amounts of NFO member milk if the cooperative would sign a contract with NFO.

129. NFO insisted that any contract provide for "a services rendered fee of 10 cents to 20 cents per hundred weight to NFO," all or part of which would be passed back to the NFO members.

130. The representatives of the proposed cooperative indicated a willingness to pay a fee to NFO but stated that such a fee could not be paid to individual NFO members supplying their milk to the cooperative.

131. As a result of the impasse over this issue, negotiations broke down and no agreement was reached.

132. [Rejected] 133. [Rejected] 134. [Rejected]

135. Supply contracts were only intermediate steps to the Master Contracts.

136. As late as October or November of 1969, NFO was continuing to try to get AMPI to sign a supply contract with NFO.

D. NFO's Alleged Efforts To Coerce Or Destroy Regional Cooperatives

137. [Rejected] 138. [Rejected]

139. Immediately after negotiations broke down between NFO and representatives of the proposed cooperative, NFO began sending its employees to meetings to urge producers to vote against merger into the proposed regional cooperative.

140. NFO actively opposed the formation of AMPI and urged dairy farmers who were NFO members to leave plants which were to become part of AMPI.

141. [Rejected] 142. [Rejected]

143. [Rejected] 144. [Rejected]

145. [Rejected]

146. NFO employees appeared at meetings throughout the States of Wisconsin and Minnesota speaking in opposition to the AMPI mergers.

147. One of the cooperatives considering merging in the proposed regional cooperative was the New Prague Cooperative Creamery in New Prague, Minnesota.

148. [Rejected] 149. [Rejected]

150. [Rejected] 151. [Rejected]

152. The NFO employees stated that it was NFO policy to oppose the AMPI regional cooperative mergers.

153. In November the Scott County NFO newsletter published a letter from a local NFO leader expressing anger at NFO's change in position and his continued support for the proposed regional cooperative.

154. [Rejected] 155. [Rejected]

156. New Prague merged with AMPI on December 1, 1969.

158. Another cooperative considering merging into AMPI was Turtle Lake Cooperative Creamery in Turtle Lake, Wisconsin.

159. [Rejected]

160. On the night before the Turtle Lake members were to vote on the merger, NFO held a meeting of NFO members to try to convince Turtle Lake members to vote against consolidation into AMPI.

161. Five Star Dairyland Cooperative was one of the cooperatives in Minnesota considering merging to form a regional cooperative.

162. In the Spring of 1969 a number of meetings were held for Five Star members to vote on the proposed merger with AMPI.

163. At the first such meeting, NFO supported the merger.

164. Thereafter, NFO employees held meetings with Five Star members who were NFO members prior to each Five Star meeting and urged them to vote against the merger.

165. [Rejected] 166. [Rejected]

167. Within a few days after Five Star voted to merge into AMPI, its plants, including those at Clarkfield, Paynesville and New Ulm, lost many NFO member producers.

168. The Rochester Dairy Cooperative was one of the original cooperatives which merged to form AMPI on October 1, 1969.

169. Don Berkhahn and Albin Rust appeared at a meeting of NFO members at the Mayo Clinic Auditorium in Rochester, Minnesota in 1969.

170. At this meeting Berkhahn urged NFO members to vote against the proposed regional cooperative mergers.

171. Many Rochester producer members ceased supplying the Rochester plant after the Rochester membership voted to merge with AMPI.

172. One of the cooperatives considering joining AMPI was Antigo Milk Producers Cooperative.

173. In October, 1969 Ed Graf attended a meeting for producer members of the Antigo Milk Producers Cooperative at Villas, Wisconsin.

174. At that October, 1969 meeting, Ed Graf advised the producers present to vote against the proposed Antigo merger into AMPI.

175. NFO had earlier supported the participation of Antigo in the new regional cooperative.

176. North Central Dairymen's Cooperative was one of the cooperatives considering participating in the proposed regional cooperative.

177. [Rejected]

178. NFO followed each informational meeting with a meeting of their own for the NCDC members.

179. [Rejected] 180. [Rejected]

181. At the merger vote on November 5, 1969, only 38% of NCDC members voted for the merger.

182. Western Wisconsin Dairies at Blair, Wisconsin, merged into AMPI on November 1, 1971.

183. [Rejected] 184. [Rejected]

185. The Blair operation was building a very large, million dollar whey-drying plant at the time of the merger.

186. [Rejected]

187. Turtle Lake Coop Creamery was one of the original cooperatives which merged to form AMPI on October 1, 1969.

188. At a meeting the night before the merger vote at Turtle Lake, Oren Lee Staley spoke against the merger.

189. Don Berkhahn attended a meeting of NFO members in the Turtle Lake area and explained NFO's opposition to the proposed merger.

190. Many NFO producer members removed their milk from the Turtle Lake plant shortly after the Turtle Lake members voted to be a part of AMPI.

191. [Rejected] 192. [Rejected]

193. NFO announced that its supply contract program would "kick off one of the biggest fights NFO has ever started . . . [a fight that] . . . would determine who would control the supply of milk." NFO also announced that "whether farmers themselves are going to do it and maintain control where they vote on final decisions and on contracts or whether they turn their milk supply over to someone else who will take the authority and power away from them."

194. These supply contracts, which provided for services rendered fees to be paid to a custodial account, were viewed by NFO as a step toward the Master Contracts.

195. [Rejected] 196. [Rejected]

197. The supply contracts were viewed by NFO as a stepping stone toward implementation of its Master Contracts.

198. [Rejected] 199. [Rejected]

200. [Rejected] 201. [Rejected]

202. The Wisconsin Department of Agriculture informed each dairy plant in the State that the NFO Milk Supply Contract provision for additional payments to NFO members might be unlawful.

203. In September of 1969, the Minnesota Department of Agriculture advised Dairy Processors, Inc. that, preliminarily, it felt that the NFO Supply Contract would violate Minnesota law.

204. The North Dakota Attorney General advised NFO that the NFO Supply Contract was illegal because the "services rendered fee" violated North Dakota's statutes forbidding discrimination among dairy cooperatives' patrons.

205. In 1970 the IRS advised AMPI Director Keith Squires that payments of more money to NFO members would not qualify as a deductible patronage dividend, and were therefore not a deductible expense on a cooperative income tax return.

206. NFO decided some time in 1968 to move into direct assistance in the marketing of member milk in addition to its efforts to block the proposed merger.

207. [Rejected] 208. [Rejected] 209. [Rejected]

210. [Rejected] 211. [Rejected] 212. [Rejected]

213. [Rejected]

214. In October, 1970 a meeting was held in John Gage's office in Kansas City; present were Ed Graf and Gordon Shafer for NFO, Wes Johnson, Gary Hanman, William Powell and John Gage for Mid-America.

215 to 221. [Paragraphs 215 to 221 all relate to what was said at the October, 1970 meeting in John Gage's office. We have made full and complete findings elsewhere in regard to that meeting, all of which are incorporated at this place by this reference. The findings proposed in paragraphs 215 to 221 are therefore rejected.]

216. [Rejected] 217. [Rejected] 218. [Rejected]

219. [Rejected] 220. [Rejected] 221. [Rejected]

222. [Rejected] 223. [Rejected] 224. [Rejected]

225. On July 19, 1969 NFO entered into its first contract to supply Graded A milk for fluid purposes with Midwest Creamery of Ponca City, Oklahoma.

226. [Rejected]

227. Between July of 1969 and January of 1970, NFO was preparing to open reloads in Missouri.

228. On July 19, 1969 NFO did not have a functioning reload program.

229. In January and February of 1970, NFO opened its first reload stations at Mountain Grove and Jefferson City, Missouri and began supplying Midwest Creamery.

230. All of the NFO reloads were leased and set up by separate local corporations or groups of individuals.

1. Order 30

231. NFO's first Chicago area reload located at Stoughton, Wisconsin became operational in June, 1970.

232. Thereafter, more than ten NFO reloads were opened and, as was the case in Missouri, these reloads were leased and operated by incorporated or unincorporated groups of NFO members.

233. Henry Soldwedel requested that the Stoughton Reload's first health permit be issued in the name of Wanzer Dairy. Stoughton was considered an extension of the Wanzer plant as far as inspection is concerned only.

234. Henry Soldwedel similarly arranged for health department permits in Wanzer's name at Harvard, Menasha and Dickeyville.

235. [Rejected] 236. [Rejected] 237. [Rejected]

238. [Rejected] 239. [Rejected] 240. [Rejected]

241. [Rejected] 242. [Rejected]

243. During the summer of 1970, NFO was trying to build a volume of milk and getting producers to transfer their milk in order to supply milk to Wanzer.

244. Additional NFO reloads were opened and NFO members and employees solicited dairy farmers to transfer their milk to NFO

245. [Rejected]

246. NFO also held meetings of nonparticipating members and informed them of their contract arrangement with Wanzer and urged to them to participate.

247. [Rejected]

248. In one two-day span in November of 1970, NFO held nineteen meetings throughout Wisconsin to discuss the supply of milk for Wanzer.

249. During the period from 1969 through at least September, 1971, NFO employees and officers, and NFO members, acting at the suggestion of NFO employees and officers, contacted members of AMPI for the purpose of soliciting them to market through the NFO dairy program.

250. Prior to May, 1972, NFO fieldmen were told that they could solicit any farmer who had an NFO Membership Agreement prior in time to any cooperative marketing agreement.

251. Prior to May, 1972, NFO employees soliciting milk production receive no instructions to inquire whether a milk producer had signed a marketing or membership agreement with a cooperative.

252. NFO employees may have solicited the milk of dairy farmers without any apparent concern for their contractual status with any cooperative.

253. NFO kept no records indicating names of diary farmers whose NFO membership agreements predated their cooperative marketing agreements.

254. [Rejected] 255. [Rejected] 256. [Rejected]

257. [Rejected] 258. [Rejected] 259. [Rejected]

260. In January, 1970 AMPI operated plants located at Mount Horeb and Wyocena, Wisconsin.

261. Some of the milk producers shipping to the plant at Mount Horeb and Wyocena had signd membership and

marketing agreements with AMPI predecessor Pure Milk Association, Inc.

262. [Rejected]

263. In early 1970, the National Farmers Organization, Inc., had a supply contract for milk with Gruber Brothers Dairy.

264. In January, 1970 Henry Ochsner, an employee of NFO, reported to the NFO Dairy Department: "I called Gruber Brothers at Baraboo again this morning to arrange to get members free from AMPI and into Gruber's plant. Gruber wants the milk and needs it, but will not risk antagonizing AMPI further by picking up another load before the patrons are out of AMPI. A full load of AMPI milk is ready and waiting for freedom."

265. The load of milk referred to in Mr. Ochsner's report as "ready and waiting for freedom" was milk going to the AMPI plant at Mount Horeb.

266. The transfer of AMPI milk from Mount Horeb to Gruber Brothers involved more than one load.

267. During the period from early 1970 through 1971, the milk of the producers which had been going to the AMPI plants at Mount Horeb and Wyocena was transferred directly to Gruber Brothers.

268. When the Sauk City NFO reload opened, the milk of the producers which had been transferred out of the AMPI plants at Mount Horeb and Wyocena moved through that reload to Gruber Brothers.

269. [Rejected]

270. In mid 1971, NFO began negotiating an agreement to supply Kraml Dairies in Chicago its full supply of raw milk.

271. When NFO was negotiating with Kraml to supply its entire requirements for milk, Kraml's requirements were approximately 400,000 pounds per day.

272. [Rejected]

273. In August of 1971 NFO entered into an agreement to supply Kraml Dairy of Chicago with its full raw milk supply.

274. In September of 1971 NFO cut back its sales to Wanzer in order to be able to fulfill its commitment to Kraml.

275. In the summer of 1971, NFO opened additional reloads at Marathon, Sauk City and Footville, Wisconsin.

276. [Rejected]

277. During the period from April, 1971 through January, 1972, except in Wisconsin where the dates were April, 1971 until September, 1971, NFO field representatives contacted many AMPI member milk producers who had signed milk marketing agreements with AMPI or its predecessors in an attempt to get them to switch their milk production to NFO.

278. [Rejected]

279. NFO employees knew they were receiving at the NFO reloads milk from farmers who were members of and had marketing contracts with AMPI.

280. [Rejected]

281. During the nine months ending September 20, 1971 the NFO custodial accounts collected $9,411.49 in AMPI and predecessor cooperative dues but paid none of that amount to AMPI.

282. [Rejected]

283. No one at NFO investigated the accuracy of AMPI letters claiming that NFO was marketing milk in violation of AMPI contracts.

284. NFO field personnel routinely reported to their supervisors on forms which reflected the progress of NFO employees in enrolling new members, the inventory of production for movement under NFO contracts and the collection of dues.

285. These reports reflected the fact that milk producers who were being solicited to sign NFO dairy agreements to ship and transfer their milk under NFO direction were shipping their milk production under some sort of a relationship with cooperatives, including AMPI.

286. [Rejected] 287. [Rejected]

288. In the Fall of 1972 NFO was unable to supply an additional volume of milk to Wanzer because it did not have sufficient uncommitted milk.

289. NFO generally had insufficient Chicago inspected milk to meet Wanzer's complete needs.

290. On at least two occasions in 1973, Wanzer asked NFO to supply additional milk, but NFO was only able to fulfill portions of those requests.

291. In 1972 Harvey Mews operated a milk hauling route, hauling milk from producers' farms to a plant located in Abbottsford, Wisconsin.

292. [Rejected]

293. The majority of the milk producers on Harvey Mews' hauling route were members of AMPI.

294. In February, 1972 the National Farmers Organization, Inc., was receiving complaints of low pay price from milk producers shipping their milk to the Marathon Reload facility operated by NFO.

295. In February or March, 1972, a meeting was held by the NFO Marathon-Clark Dairy Bargaining Committee at a restaurant in Abbottsford, Wisconsin, to discuss the problem of the low pay price for the Marathon Reload Shippers.

296. During the meeting at the restaurant in Abbottsford, Wisconsin, the NFO Marathon-Clark Dairy Bargaining Committee discussed shipping the milk of the Marathon Reload shippers on a direct basis to other locations.

297. [Rejected]

298. NFO representatives discussed the movement of milk on the Harvey Mews' route and the possibility of contracting with another handler.

299. Thereafter, efforts were made by NFO employees to get the producers on the Harvey Mews' route to switch their milk from the AMPI Abbottsford plant to a location that was then being considered by NFO.

300. NFO employee Ray Keck approached various plants about the possibility of their buying this milk.

301. [Rejected] 302. [Rejected]

303. [Rejected] 304. [Rejected]

2. Order 68

304. In late 1970 or early 1971, NFO first discussed supplying milk to handlers in the Minneapolis-St. Paul area.

305. At that time NFO was not marketing any Grade A milk in the State of Minnesota.

306. [Rejected]

307. The first Twin Cities buyer with whom NFO negotiated was Ewald Dairy.

308. NFO told the representatives of Ewald that they were prepared to deliver all or part of Ewald's requirements within a reasonable time.

309. [Rejected]

310. NFO entered into a contract to supply Schroeder Dairy's requirements shortly before July, 1971.

311. The Schoreder contract called for NFO to supply Schroeder its milk requirements beginning on July 27, 1971.

312. [Rejected] 313. [Rejected] 314. [Rejected]

315. In the spring of 1971 members of NFO opened a reload at Chetek, Wisconsin to move milk to fluid milk handlers on Order 68.

316. The Chetek Reload began oeprating in May, 1971.

317. NFO was anxious to move milk production into the Chetek Reload when it began operations.

318. In 1971 NFO representatives contacted milk producers to get them to switch their milk production to the Chetek Reload operated by NFO members.

319. In 1971 many AMPI member milk producers switched their production from AMPI plants or plants under AMPI auspices to the NFO Chetek Reload.

3. Current NFO Goals

320. [Rejected]

321. In or about December, 1974, NFO instituted the "Think 30 Program."

322. It was the goal of the NFO Think 30 program to put together 30% of the nation's total production of milk, meat and grain and announce prices for those commodities.

323. If industry refuses to pay the price announced by NFO after it has control of 30% of any commodity, the NFO program contemplated an automatic holding action.

324. NFO presently seeks to have 30% of the milk produced in the United States marketed through the NFO reload system or under NFO contracts.

325. NFO has recently come to believe that it can accomplish its goals with control of 30%, instead of 60%, of the nation's milk production.

326. It is a goal of NFO to set the price of the milk it markets for its members throughout the nation.

4. North Central Dairymen's Cooperative

327. North Central Dairymen's Cooperative was formed on June 15, 1964 to provide a dairy cooperative organization for the NFO members who lost their milk market when the Owen Dairy Company went out of business in April, 1964.

328. Although North Central was made up of NFO members, the North Central Board managed the North Central operations separately from any NFO controls.

329. In 1969 North Central sought a facility near the Chicago market so that North Central's members could receive the benefit of a more favorable zone differential.

330. [Rejected] 331. [Rejected] 332. [Rejected]

333. [Rejected] 334. [Rejected] 335. [Rejected]

336. [Rejected] 337. [Rejected] 338. [Rejected]

339. [Rejected] 340. [Rejected]

341. In August, 1969, RMD, Inc., a corporation created by the Rettigs and Dalton Wery to manage the Hartford reload, and the Temkins executed a one-year lease for the Hartford facility which provided RMD with an option to purchase the Hartford property.

342. NFO was not a party to the lease between the Temkins and RMD but NFO officials were familiar with the terms of the lease.

343. In August, 1969 RMD entered into a lease agreement with North Central for the Hartford facility.

344. [Rejected] 345. [Rejected]

346. During May, 1970, NFO was in the process of setting up its first reload in Wisconsin, the Stoughton Reload.

347. On May 7, 1970 Norbert Connor, Henry Ochsner, Steve Pavich, Tony Briskie, Allen Skroch and Ric Avila met at the Aloha Inn, Madison, Wisconsin, to discuss NFO's taking over the Hartford lease.

348. [Rejected]

349. After the Aloha Inn meeting the NFO representatives met with Jachial Temkin at his office and at the office of John Shiels, Temkin's attorney. During those meetings a five year lease for the Hartford facility was executed to take effect

September 1, 1970 with Allen D. Skroch and Henry Ochsner, both of whom were NFO members, as lessees and NFO as guarantor.

350. No North Central Board member or RMD principal was invited to attend nor did they attend any of the May 7, 1970 meetings with NFO representatives and the Temkins.

351. NCDC and RMD were not informed by NFO of these meetings and arrangements.

352. The May 7 lease provided minimum monthly rental of three to four cents for each one hundred pounds of milk received at the facility with a minimum of $2,500, whereas RMD's lease had had a maximum of $2,500.

353. When the May 7 lease was executed, neither the Temkins nor NFO notified either the North Central Board or RMD of the agreement.

354. By June, 1970 it was common knowledge that North Central and NFO were moving in opposite directions with one another, like two trains running at each other on the same track.

355. [Rejected] 356. [Rejected] 357. [Rejected]

358. On June 25, 1970, RMD notified the Temkins in writing of its intention to exercise its option to purchase the Hartford facility.

359. [Rejected]

360. On or about July 2, 1970, John Shiels, attorney for the Temkins, notified Ernest C. Gay, attorney for RMD, that the Temkins refused to honor RMD's option because of "substantial defaults" under the lease.

361. By return letter Ernest C. Gay stated that RMD was unaware of such defaults under the lease and requested an explanation, but no such explanation was ever provided.

362. [Rejected] 363. [Rejected] 364. [Rejected]

365. RMD's final rent check for the month of August, 1970 (check number 216), dated September 23, 1970, bearing on the face of the check "1 year lease paid in full through 8/29/70" was deposited in the Temkins' bank account on September 30, 1970.

366. [Rejected]

367. During the month of May, 1970, North Central delivered 9,057,160 pounds of milk to Wanzer Dairy in Chicago from the Hartford facility.

368. [Rejected] 369. [Rejected]

370. [Rejected] 371. [Rejected]

372. On July 24, 1970 the North Central Board met with Ed Graf and Ric Avila to discuss the desposition of the Hartford facility.

373. At that time NFO had only one reload in operation in Wisconsin with about 127,000 pounds of milk per day.

374. At a meeting in Wausau, Wisconsin on July 24, 1970, Ed Graf indicated that NFO had guaranteed the remainder of RMD's rent payments to the Temkins but had not paid any rent payments on behalf of RMD.

375. [Rejected] 376. [Rejected]

377. It was NFO's intention to offer to include all North Central facilities and producers in NFO's proposed Federal Order No. 30 marketing unit.

378. [Rejected]

379. Several days after the July 24, 1970 meeting, Ric Avila and Ed Graf met again with the North Central Board to offer that they become part of an NFO marketing unit.

380. [Rejected]

381. Jachial Temkin assisted NFO in finding New Jersey and New York markets for the milk of its members.

382. [Rejected] 383. [Rejected]

384. In August, 1970, North Central and NFO were still discussing the possibility of selling or leasing all of North Central's Grade A manufacturing facilities to NFO for about $10,000 per month but NFO would not make any commitments and stated the price North Central was offering was too high.

385. [Rejected]

386. Ed Kriewaldt was employed by RMD as the Hartford fieldman from August, 1969 until NFO took over the Hartford reload one year later.

387. While serving as an RMD employee, Ed Kriewaldt frequently had discussions with Ed Graf, Don Berkhahn and Ric Avila.

388. When Ed Kriewaldt was an RMD employee, his salary was about $300 per month.

389. After Ed Kriewaldt learned that NFO was going to take over the Hardford reload, he contacted NFO for he believed that NFO would want to employ him in the same capacity that he was working for RMD.

390. [Rejected]

391. In preparation for NFO's takeover of Hartford on August 28, 1970, Ed Kriewaldt assisted John Van Boxtel and Ed Graf in coordinating the truckers and permits for Hartford.

392. [Rejected] 393. [Rejected]

394. From August, 1969 up to August 30, 1970, North Central accounted to the Market Administrator for the following number of Hartford producer members and product pounds received at Hartford;

Month	Producer Members	Product Pounds
Aug., 1969	31	46,489
Sept., 1969	130	3,636,432
Oct., 1969	140	4,623,086
Nov., 1969	171	5,203,112
Dec., 1969	171	6,439,875

Jan., 1970	191	7,315,332
Feb., 1970	241	8,685,399
Mar., 1970	261	10,550,982
Apr., 1970	268	11,154,851
May, 1970	276	12,154,139
June, 1970	274	11,624,504
July, 1970	276	11,407,404
Aug., 1970	272	10,210,157

395. [Rejected] 396. [Rejected] 397. [Rejected]

398. [Rejected] 399. [Rejected] 400. [Rejected]

401. [Rejected]

5. Mid-America

402. In the fall of 1969, NFO needed milk to fulfill its contract with Midwest Creamery.

403. Beginning in the fall of 1969, NFO attempted to recruit Mid-America Missouri members to market milk in NFO's marketing program.

404. [Rejected]

405. NFO fieldmen contacted some dairy farmers who were Mid-America members.

406. NFO fieldmen called on milk producers who had not signed NFO Membership Agreements.

407. Their purpose in calling on producers who had not signed NFO Membership Agreements was to get these producers to become a part of the NFO marketing program.

408. Some of the producers the NFO fieldmen called on had not signed NFO Membership Agreements and these producers were marketing their milk through Mid-America.

409. In 1970, NFO fieldmen called on milk producers, some of whom were than marketing their milk through Mid-

America, in an attempt to get more milk for NFO. Some of these producers later started shipping through NFO.

410. A letter was drafted in Corning, Iowa and read to Hackler over the telephone, who had it typed up by the secretary in the Springfield office.

411. The letter stated that the producer who was signing the letter had no record of having signed a Mid-America agreement, and that if he had signed a Mid-America agreement, this letter was notice that the proudcer would like to have the Mid-America agreement terminated.

412. Hackler caused the letters to be distributed to patrons who were shipping to the NFO member reload at the time the letter was drafted, including those persons who had membership agreements with Mid-America.

413. Hills and Hackler themselves mailed some of the letters and other termination notices to Mid-America.

414. [Rejected] 415. [Rejected]

416. [Rejected] 417. [Rejected]

418. Billy Stacey was a Mid-America hauler in Southwest Missouri.

419. Billy Stacey was the lessee of a station which was going to act as an NFO receiving station or transfer point in Springfield, Missouri.

420. Ted Forbes, while an employee of NFO, actively solicited or encouraged persons to solicit Mid-America members to join the National Farmers Organization and to market milk through that organization.

421. Ted Forbes was paid by the National Farmers Organization for his work in solicitation of Mid-America members.

422. NFO employees called on and attempted to procure milk from farmers, many of whom may have signed Mid-America membership agreements. Some of those farmers later switched their production to an NFO facility.

E. Misrepresentation

423. [Rejected] 424. [Rejected] 425. [Rejected]

426. [Rejected] 427. [Rejected] 428. [Rejected]

429. [Rejected]

430. NFO published a pamphler entitled "The Snubber."

431. [Rejected]

432. NFO employees and representatives distributed large numbers of the "Snubber" at various county meetings and used it in soliciting dairy producers.

433. [Rejected] 434. [Rejected]

435. [Rejected] 436. [Rejected]

437. NFO Reporters over the years have sometimes claimed that NFO was responsible for specific increases in the M-W Series Price.

438. NFO's M-W Series claims were disseminated through various media including audio-visual aids, pamphlets and graphs, for use in soliciting dairy producers.

439. [Rejected] 440. [Rejected]

441. In November, 1972, NFO caused articles to be published in the November, 1972 NFO Reporter entitled, "NFO Gets Him $641.67 More For His Milk," and "Dairyman Finds NFO Prices, Tests and Returns All Above AMPI on Alternate Day Milk Deliveries."

442. This article was published in an effort to convince dairy farmers they would be better off if they marketed milk through NFO.

443. These articles purported to show that a farmer named Delmar Jenneman, who marketed his milk to AMPI one day and to NFO the next for eight months during 1972, would have made $641.67 more by shipping it all through NFO than if he had marketed it all through AMPI.

444. [Rejected] 445. [Rejected] 446. [Rejected]

447. The same article was reprinted as part of a December, 1972 NFO Reporter, Dairy Edition, at Ben Stong's suggestion and with Ed Graf's approval.

448. This was circulated to dairy farmers to induce them to market their milk through NFO.

449. [Rejected]

450. An NFO zone supervisor at one NFO county meeting in February of 1972 told the assembled dairy farmers that "AMPI has been found guilty of restraint of trade. The Federal Justice Department is also suing AMPI—an effort to keep NFO from receiving the credit for this suit. If we win we will break·AMPI and Mid-Am."

451. [Rejected] 452. [Rejected] 453. [Rejected]

454. [Rejected] 455. [Rejected] 456. [Rejected]

457. [Rejected]

F. Alleged Misrepresentation To USDA And IRS

458. Federal Milk Marketing Orders have been promulgated for 62 geographic areas of the country regulating certain aspects of milk marketing and sales therein.

459. Each of the Federal Milk Marketing Orders establishes and utilizes a classified price system in which milk is classified according to the use to which it is put; a separate price is established for each classification.

460. The Cooperative Qualification Branch of the Dairy Division receives applications from associations of dairy farmers who request to be given the privileges and rights of cooperative marketing associations under the Agricultural Marketing Agreement Act; the Cooperative Qualification Branch has the responsibility for making recommendations to the Director of the Dairy Division for both an initial qualification and the continuing qualification of cooperative marketing associations.

461. If the Dairy Division determines that an association is within a particular Federal Order's definition of "Cooperative Marketing Association," an additional determination must be made by the Dairy Division as to whether such cooperative marketing association has full authority in the sale of its members' milk.

462. The determination as to whether a cooperative marketing association has full authority in the sale of its members' milk requires submission of proof that such association has full authority in regard to the sale of the milk of its members.

463. Where the Dairy Division has not determined that a cooperative marketing association is performing certain marketing services such as checking weights and tests and providing market information for a producer or group of producers, the Federal Milk Marketing Administrator performs such services and requires that the handler to whom such producers' milk is being sold deduct a fee from their checks and remit such fee to him in payment for such services.

464. If the Dairy Division has (1) qualified a cooperative marketing association and (2) has determined that the association is performing the marketing services specified in the provisions of the applicable Order, no fee is deducted by the handler to be remitted to the Administrator; instead, the full use value or blend price may be paid to the association or directly to the farmer.

465. Blending (also termed "reblending") occurs where a cooperative takes all the money which it has left over from all of its sales in all markets and all use classifications, and divides such money among its members in whatever fashion it deems appropriate.

466. NFO is the only association qualified by the USDA to market milk that was exempt from payment of federal income taxes under ¶ 501(c)(5) of the IRC at the time so qualified.

467. In the Dairy Division's opinion, Article I of the NFO Membership Agreement, which purportedly gives NFO au-

thority to act as representative in collective bargaining for its members except for those commodities covered by other marketing contracts, did not give NFO full authority to market the milk of its members.

468. [Rejected]

469. 7 CRF § 900.353 requires an applicant to have full authority in the sale of its members' milk in order to become qualified by the Dairy Division.

470. In order to obtain qualification as a cooperative marketing association, NFO was required to present to USDA evidence that it had full authority in the sale of its members' milk, including evidence that it had full authority to collect in its own name the proceeds of sale of the milk of its members.

471. When Avila learned that USDA required NFO to submit evidence of its authority to collect the proceeds of sale of the milk of its members, Form 7-3-39AP., "NFO Milk Sales Agreement," was prepared for submission to USDA.

472. Through NFO answers to the question set forth in Section C-1 of the Form DA-25, Avila represented to the Dairy Division in March, 1970 that NFO members by executing NFO Form No. 7-3-39AR provided NFO with full authority to market its members' milk.

473. The only milk sales agreement submitted by NFO with its application on March 11, 1970 was Form 7-3-39Ar.

474. NFO Form No. 7-3-39A was the milk sales agreement being used at the time that Avila filed NFO's DA-25 application for qualification and was still being used as of June 9, 1971.

475. In reviewing NFO's application for qualification with Avila, USDA suggested that NFO should clarify its Form 7-3-39A.

476. On May 8, 1970, Avila and Gordon Shafer came to Washington, met with Forest, March, La Liberte and some attorneys from the USDA General Counsel's Office, and stated that the Form 7-3-39AR was the NFO milk sales agreement

and was basically a revision of the Form 7-3-39A, the "AR" standing for "as revised."

477. [Rejected] 478. [Rejected]

479. The Cooperative Qualification Branch's conclusion that there was signed 7-3-39AR Forms in the field was based upon Avila's statement to that effect at the May 8, 1970 meeting.

480. Form 7-3-39AR has never been used by NFO except in its application to USDA.

481. In preparing NFO Form 7-3-39AR, Ric Avila merely added a paragraph numbered 2 to Form 7-3-39A and changed the form's designation to 7-3-39AR.

482. The addition of new paragraph 2 to Form 7-3-39A, designated as Form 7-3-39AR, purported to give NFO "full power and authority in its own name to collect the entire amount due for milk delivered hereunder."

483. [Rejected]

484. The NFO membership agreeement, standing alone, confers no authority on NFO to collect the proceeds of the sales of its members' milk.

485. [Rejected] 486. [Rejected] 487. [Rejected]

488. The NFO Dairy Custodial Account, allegedly "an agent and/or instrumentality of NFO," collects, and is authorized by the members to collect, the full amount due for milk of NFO members.

489. [Rejected] 490. [Rejected]

491. Avila stated to the Dairy Division that NFO was using Form No. 7-3-39AR in the field so that the Dairy Division would qualify NFO as a cooperative marketing association under the Agricultural Marketing Agreement Act of 1937.

492. [Rejected]

493. The fact that an association had members who were not and had never been engaged in the production of agricultural commodities whatsoever would be fatal to the Dairy Division's qualification of such association.

494. In response to Paragraph A-12 of Form D-24 asking how long a producer may be inactive before his membership is terminated, Avila prepared and gave to the Dairy Division on March 11, 1970 the answer "Terminated immediately if he no longer owns or controls production at the farm level."

495. [Rejected]

496. In response to Paragraph A-4 of Form DA-25, NFO represented to the Dairy Division that membership in NFO was restricted to producers of farm commodities for those who had control of the production of commodities at the farm level.

497. [Rejected]

498. NFO in fact had no procedure whereby the membership rolls are periodically updated to remove from the rolls those who have quit farming.

499. NFO has carried non-producers on its membership rolls for lengthy periods of time.

500. In qualifying NFO as a cooperative marketing association, the Dairy Division relied upon NFO's assurance that there were no non-farmer members of NFO and that all members were producing agricultural commodities.

501. [Rejected] 502. [Rejected]

503. In its application for exemption from federal income taxes, submitted to the IRS and dated 11-7-56, William Barnes, Secretary of NFO represented to the IRS that the purpose for which NFO was formed was "to promote agricultural benefits for all farmers" and that the only activities that the organization would engage in would be to "organize farmers on the county level for the purpose of discussing their problems and solutions thereto and securing recognition of these problems by the United States Congress and others."

504. [Rejected] 505. [Rejected] 506. [Rejected]

507. NFO never reported to the IRS that it had applied for, and had been granted, qualification as a cooperative marketing association by the Dairy Division of USDA.

508. Article II, Section 5 of the bylaws of NFO, as adopted at the 1969 National Convention, provides:

> To assure that National Farmers Organization acts only as a service organization, it is hereby provided that the Board of Directors and officers of this organization are expressly forbidden to enter into, or engage in any business in behalf of or in the name of the organization, of the sort commonly engaged in by corporations for profit.

509. [Rejected] 510. [Rejected] 511. [Rejected]

512. NFO first became qualified as a cooperative marketing assocition by the Dairy Division of the USDA in July, 1970; in order to obtain such qualification, NFO represented that it marketed its members' milk.

513. [Rejected]

514. In reaching a determination as to whether NFO was in fact marketing milk pursuant to a contract between NFO and a handler, Forest made a distinction between the wording "N.F.O. is selling" and the wording "N.F.O. is selling on behalf of its members."

515. Until NFO began to actually market milk, the Dairy Division would not qualify NFO as a coop.

516. At a meeting in early 1970 of Forest and NFO representatives, there was a discussion of whether NFO, as an organization, was selling milk to milk dealers, as distinguished from NFO, acting only as an agent for its producers and arranging for contracts between buyers and individual producers.

517. Avila, Sinclair and Graf have specifically told Forest and La Liberte that NFO as an organization sells milk.

518. [Rejected]

519. In qualifying NFO Herb Forest had a precise understanding with NFO that NFO was selling milk to handlers, and that the handlers were buying milk from NFO; this understanding was between Forest, Graf, Avila and Sinclair.

520. In qualifying NFO, the Dairy Division qualified NFO of Corning, Iowa as opposed to any other association or organization such as the National Dairy Commodity Division of NFO or the NFO Members Dairy Trust.

521. NFO membership agreement provides that NFO, Inc. "shall not become legal owner or engage in business activities, but must remain within the framework of a service organization bargaining for its members who have signed marketing contracts."

522. [Rejected] 523. [Rejected]

524. From 1969 to date, members of NFO have established, acquired, or leased reload facilities to which the milk of NFO members is delivered.

525. NFO activities on behalf of NFO members in collective bargaining and marketing assistance are of essentially the same type and character for grain, livestock and milk products.

526. [Rejected] 527. [Rejected] 528. [Rejected]

529. [Rejected] 530. [Rejected] 531. [Rejected]

532. The National Dairy Trust is separate and apart from NFO.

533. The funds in custodial accounts are separate from the funds of NFO.

534. [Rejected]

535. NFO has never claimed any right to the proceeds from the sale of the products of its members.

536. NFO does not own any collection points, grain elevators, processing plants, milk reloads or any other assets for the marketing, processing, or transporting of the products of its members.

537. NFO has no net earnings and it makes no distributions of any kind to its members.

538. [Rejected] 539. [Rejected]

540. [Rejected] 541. [Rejected]

542. NFO until dissolved, is prohibited by its articles of incorporation, from paying dividends or making distributions in property ot its members or officers.

543. By letter dated September 20, 1970, NFO requested the Dairy Division to qualify it as a cooperative marketing association on Federal Milk Marketing Orders Nos. 106 and 126, representing that NFO operated two transfer stations in Missouri near Jefferson City, Missouri and Mountain Grove, Missouri, which were "exactly like the ones in Wisconsin," that NFO would handle "all aspects of marketing milk," and that field service was provided by Mr. Bruemmer and Mr. Hills, both of whom had attended the University of Missouri school for fieldmen.

544. Ric Avila drafted this September 20, 1970 letter for Ed Graf's signature and caused it to be sent to the USDA.

545. As of September 30, 1970, neither Mr. Hills nor Mr. Bruemmer had attended the University of Missouri school for fieldmen nor did they have any formal training in that regard.

546. [Rejected] 547. [Rejected]

548. The NFO Jefferson City reload is not owned by NFO.

549. On February 20, 1970, Frank Schwarzer, Charles Braun and Wilbur Rackers leased the Jefferson City reload with the lease being guaranteed by NFO.

550. From the execution of the lease on the realty on which the Jefferson City reload facility was constructed until the spring of 1971, Henry Rackers paid the rent under such lease.

551. A corporation by the name of Mid-Missouri Milk Producers Association, Inc. was formed by a number of NFO milk producers in the Jefferson City area on February 16, 1971 to oprate the financing of the NFO Jefferson City reload facility.

552. Mountain Grove Dairy Producers, Inc. was incorporated as a Missouri corporation on February 16, 1971.

553. Mountain Grove Dairy Producers, Inc. leased the Mountain Grove reload facility on March 15, 1971.

554. [Rejected] 555. [Rejected] 556. [Rejected]

557. [Rejected] 558. [Rejected] 559. [Rejected]

560. A group of individual farmers incorporated Southwest Milk Producers, Inc., and paid for the equipment which Billy Stacey installed in the Springfield reload station.

561. Billy Stacey was authorized by the Board of Directors of Southwest Milk Producers, Inc. to maintain the Springfield reload station.

562. [Rejected] 563. [Rejected] 564. [Rejected]

565. [Rejected] 566. [Rejected] 567. [Rejected]

568. All equipment and tanks installed at the Springfield reload station were purchased by Southwest Milk Producers, Inc.

569. [Rejected] 570. [Rejected]

571. [Rejected] 572. [Rejected]

573. Since the Springfield reload station opened, Stacey maintained a public liability insurance policy, at least until January, 1973, on the premises and has continued paying the annual premiums on such policy without even being reimbursed by NFO for such amounts.

574. The insurance policy was in Stacey's name and Stacey has never given copies of the policy to NFO.

575. Affidavits signed by Billy Stacey and others were submitted by NFO in response to an inquiry made by the USDA Dairy Division as to who was operating the Springfield plant and were considered by the Dairy Division in its determination that NFO was the operator of such plant.

576. [Rejected]

577. Al Scott told Billy Stacey that he was being asked to lease the Springfield reload in Stacey's own name "because NFO couldn't lease or own any property."

578. Stacey was not working for NFO while loading and unloading the milk.

579. Stacey received a $1,200 payment from Southwest Milk Producers, Inc. for his loading-unloading services during the months of February, March and April, 1971.

580. The determination that NFO was a qualified cooperative on the North Texas Order in relation to the Springfield reload was made March 25, 1971.

581. Forest signed the determination that NFO was a qualified association on the North Texas Order on March 25, 1971 and sent a copy of it to Dunham.

582. The determination was made retroactively to February 1, 1971 since the Dairy Division believed the conditions prevailing on such date were the same as those prevailing on March 25, 1971.

583. [Rejected] 584. [Rejected] 585. [Rejected]

586. [Rejected] 587. [Rejected] 588. [Rejected]

589. A qualified cooperative must distribute market information, such as pool data and general information regarding milk movements and milk marketing to its members.

590. On May 24, 1971, Dunham, Market Administrator for the North Texas Order, told La Liberte that after reviewing NFO's annual report, Dunham still saw nothing to indicate that NFO was marketing its members' milk. Dunham reported that although NFO repeatedly promised to perform numerous kinds of marketing services, the Dairy Division always had to talk to reload personnel of haulers to obtain any information regarding milk movements.

591. Avila gave Mid-Am Ex. 500 at 8 (22.23) to Dairy Division Deputy Director March at a March, 1971 meeting.

592. The purchase price is collected by the Diary Trust and disbursed by the Dairy Trust to the members.

593. [Rejected]

594. NFO does not collect and has not collected proceeds from handlers for members' milk.

595. As of June 8, 1971, the Dairy Division had not received from NFO any evidence that NFO made payments for the rent due under the lease on the Springfield facility, that NFO arranged and paid for the inspection of its members by the Texas health authorities, or that NFO rendered bills to its Texas health authorities, or that NFO rendered bills to its Texas customers from the NFO headquarters in Corning, Iowa and received the proceeds of such sales at such headquarters.

596. NFO never received the proceeds from the sale of milk to Boswell at its Corning headquarters; rather, a separate legal entity, the Springfield Receiving Station Account (which was subsequently replaced by the NFO Member Dairy Trust), received such proceeds.

597. [Rejected]

598. The proceeds of all NFO members' milk sales which are not paid directly to the producers are received by various NFO custodial accounts. With the exception of deductions which it claims, NFO has no interest whatsoever in such custodial accounts and the moneys therein are the property of the NFO members.

599. The only documentary evidence on which the Dairy Division found that NFO, not Stacey, was the operator of the Springfield reload, was the self-serving statements prepared by Avila and Stacey and submitted to the Dairy Division.

600. [Rejected] 601. [Rejected] 602. [Rejected]

603. Some members of NFO are not farmers and are not engaged in the production of agricultural products.

604. [Rejected]

605. Some NFO members were not farmers when they joined.

606. [Rejected] 607. [Rejected] 608. [Rejected]

609. NFO fixes the price of commodities, including milk, as between those of its members for whom it bargains.

610. NFO Supply Contracts were designed and intended to raise the price of milk in plants executing such contracts.

611. [Rejected] 612. [Rejected] 613. [Rejected]

614. [Rejected] 615. [Rejected] 616. [Rejected]

617. [Rejected] 618. [Rejected]

G. Alleged Bad Faith Counterclaim

619. NFO's counterclaim was filed on or about May 19, 1971. An amended counterclaim was filed June 25, 1971.

620. [Rejected] 621.[Rejected] 622. [Rejected]

623. [Rejected] 624.[Rejected] 625. [Rejected]

626. [Rejected] 627.[Rejected]

628. NFO has had persistent problems with uncollected back dues.

629. NFO has borrowed money to meet operating expenses every year since 1968 through 1974.

630. [Rejected]

631. In June, 1971, Oren Lee Staley announced to a staff meeting that the financial situation of the organization was critical.

632. The "Crisis Drive" for funds began in July, 1971.

633. The primary appeal of this drive was that millions of dollars must be raised to finance pending litigation.

634. The appeal for money in the Crisis Drive was designed to reach every NFO county.

635. The NFO counties were told that AMPI had sued NFO in Wisconsin in August, 1971 and had counterclaimed against NFO in September, 1971; that NFO would incur enormous expenses in prosecuting its litigation; that recoveries as high as $125 million were possible; and that the future of NFO might depend upon the contributions of NFO members.

636. This appeal resulted in collection of over $1 million in two or three weeks.

637. As of September 30, 1971 NFO had collected approximately $1,190,000 pursuant to the Crisis Drive effort.

638. [Rejected] 639. [Rejected]

640. The Crisis Drive appeal continued into early 1972, with NFO asking the counties to donate money from their treasuries and to waive all or part of the counties' share of NFO dues.

641. Staley announced to a 1972 NFO convention that he hoped NFO could raise $10 million in loans.

642. [Rejected] 643. [Rejected] 644. [Rejected]

645. [Rejected] 646. [Rejected] 647. [Rejected]

648. [Rejected] 649. [Rejected] 650. [Rejected]

651. NFO's complaint was amended to name a number of individual NFO farmer members as claimants in the counterclaim against AMPI, individually and as representatives of an alleged class.

652. [Rejected] 653. [Rejected] 654. [Rejected]

655. [Rejected] 656. [Rejected] 657. [Rejected]

658. [Rejected]

659. Some of the counterclaimants are not, and at the time of filing of the counterclaim were not, dairy farmers.

660. Oren Lee Staley, an individual counterclaimant, has not been a dairy farmer for many years.

661. All of the counterclaim plaintiffs expected NFO or someone other than themselves to pay their costs and legal fees' NFO even undertook to pay the expenses many of them incurred in attending their depositions.

662. [Rejected]

663. Avila is not trying to collect any damages for personal injuries in this lawsuit.

664. On July 31, 1974 NFO counsel filed a brief on behalf of the individual counterclaimants.

665. In that pleading NFO attorneys state that the nondairy farmer individual counterclaimants are seeking only to recover damages suffered by NFO, not by themselves personally.

H. Damage Theory And Computation

Paragraphs 666 through 752—[Rejected]

Part H of AMPI's Phase III proposed findings of fact, entitled "Damage Theory and Computation," contains paragraphs 66 to 752, respective. AMPI added a damage summary on page 148 of its Phase III proposed findings which stated the following:

DAMAGE SUMMARY

As a direct and proximate result of the unlawful activities of NFO and the other Phase III defendants, AMPI sustained at least the following damages:

(1)	Lost Checkoff	$ 116,412.02
(2)	Price Fixing Damages	2,948.552.78
(3)	Improper Unit Pooling Damages	352,786.58

(4)	Mt. Horeb Plant Losses	107,807.45
(5)	Abbottsford Plant Losses	33,622.00
(6)	North Central Region Plant Losses	$5,240.994.00
(7)	Blair, Wisconsin Plant Hauling Losses	191,359.00
(8)	Forced Sale of Howard Lake Plant—Loss	153,470.00
	Total	$9,145,003.83

We reject each paragraph of AMPI's Phase III proposed findings of fact in regard to damages, paragrpahs 666 to 752, for the reasons that we need not and therefore do not reach any question of AMPI's alleged damages in light of the conclusions of law which we have determined to be applicable to Phase III of this case.

Discussion Of NFO's Phase III Proposed Findings Of Fact

NFO proposed 110 paragraphs of findings of fact, divided into six separate parts, in connection with its defense of AMPI's Phase III claim. In light of our determination of the Phase III issues of liability against AMPI and in favor of NFO, it is unnecessary to examine NFO's proposed findings of fact in any detail. It is appropriate, however, to make and state particular findings and conclusions suggested by particular paragraphs of NFO's proposed findings of fact as those paragraphs present questions which relate to and reflect our determination of the sufficiency and weight of the evidence adduced by AMPI in support of its Phase III claim.

We therefore make and state the following findings and conclusions, giving those paragraphs new consecutive paragraph numbers which contain the paragraph number of NFO's propoed findings of fact in parenthesis for ready reference.

1. (17) AMPI claims either in its brief (AMPI Br., p. 7) or its proposed Conclusions of Law (ACL 4,12) that Henry Soldwedel, Jachial Temkin, Gruber Brothers and Harvey Mews conspired with NFO to monopolize the sale of raw milk

throughout the United States and that Soldwedel and Temkin further conspired with NFO to violate the Agricultural Fair Practices Act.

2. (25) The weight of the evidence in the record does not support a finding of fact that Soldwedel, either as an individual or as the chief operating officer of Southland's Wanzer plant, was aware of, or joined in, any purpose of NFO, if any, to monopolize the sale of raw milk throughout the United States.

3. (26) The weight of the evidence in the record does not support a finding of fact that Soldwedel conspired with NFO to do anything forbidden by the Agricultural Fair Practices Act.

4. (27) The weight of the evidence in the record does not support a finding of fact that Soldwedel, either as an individual or as the chief operating officer of Southland's Wanzer plant, had any agreement with NFO other than the normal one between a buyer and a seller.

5. (46) The weight of the evidence in the record does not support a finding of fact that Temkin was aware of, or joined in, any purpose of NFO, if any, to monopolize the sale of raw milk throughout the United States.

6. (47) The weight of the evidence in the record does not support a finding of fact that Temkin conspired with NFO to do anything forbidden by the Agricultural Fair Practices Act.

7. (48) The weight of the evidence in the record does not support a finding of fact that Temkin and NFO, its employees or members had any agreement other than the normal one between a landlord and a tenant.

8. (52) The weight of the evidence in the record does not support a finding of fact that Gruber Brothers was aware of, or joined in , any NFO purpose, if any, to monopolize the sale of raw milk throughout the United States.

9. (53) The weight of the evidence in the record does not support a finding of fact that Gruber Brothrs and NFO had any agreement other than the normal one between a buyer and a seller.

10. (58) The weight of the evidence in the record does not support a finding of fact that Mews was aware of, or joined in, any NFO purpose, if any, to monopolize the sale of raw milk throughout the United States.

11. (59) There is not even evidence in the record to suggest that Mews had any agreement with NFO.

12. (87) There is insufficient evidence in the record to support a finding of fact that NFO induced any farmer to breach any agreement that he may have had with AMPI.

13. (88) There is insufficient evidence to support a finding of fact that NFO or any of its employees or agents made any material false reports about AMPI's finances, activities or management.

14. (89) The weight of the evidence in the record does not support a finding of fact that NFO lowered its prices to various Order 30 handlers, including Mar-Vel and Kraml, for the purpose of harming AMPI or any other cooperative.

15. (91) The weight of the evidence in the record does not support a finding of fact that the allegedly false information submitted by NFO to the USDA was relevant to, or relied upon in the grant of, NFO's qualification as a marketing association under federal milk marketing orders.

16. (82) The weight of the evidence in the record does not support a finding of fact that NFO enjoyed any reduction in tax liability by rason of alleged misrepresentations to the Internal Revenue Service.

17. (93) The weight of the evidence in the record does not support a finding of fact that NFO's counterclaim was brought or has been pursued in bad faith.

18. (108) The evidence in the record does not support a finding of fact that NFO coerced or initimidated any farmer, let alone any AMPI member.

19. (109) There is insufficient evidence to support a finding of fact that NFO or any of its employees or agents made any

false reports about AMPI's finances, activities or management.

20. (110) The evidence in the record does not support findings of fact that NFO (1) knew that any reports it may have made about AMPI's finances, activities or management were false or (2) knowingly permitted its employees or agents to make any such false reports.

21. (112) AMPI failed to sustain its burden of proving that it has been damaged by NFO's alleged violations of the Sherman Act or the Agricultural Fair Practices Act.

PHASE III CONCLUSIONS OF LAW[32]

1. We need not and do not reach the question of whether NFO is entitled to the exemption from the antitrust laws conferred by the Capper-Volstead Act, 7 U.S.C. §§ 291-292, and Section 6 of the Clayton Act, 15 U.S.C. § 17.[33]

2. We need not and do not reach the question of whether NFO is incapable of conspiring with its members, employees, officials, agents or the NFO Dairy Custodial Account or dairy

---

[32] Consistent with procedures followed in connection with Phase I and Phase II of this case, the conclusions of law which we state for Phase III of the case are keyed to the conclusions of law proposed by the party for whom judgment will be rendered. For purposes of appellate review, we state for the record that we have considered and expressly reject all sixteen of the Phase III conclusions of law proposed by AMPI, except the single conclusion proposed in paragraph 1 thereof, the substance of which we adopt in the following form:

> 1. This Court has subject matter jurisdiction over the claims against NFO, Inc. and the individuals named as counterclaim defendants in AMPI's First Amended Counterclaim. The Court also has personal jurisdiction over all Phase III defendants. Venue is proper as to AMPI's Phase III claims.

[33] We, of course, adhere to what we said in Phase I in regard to how we believe we would have been required to decide the Capper-Volstead antitrust exemption question if we had been required to do so.

reloads for purposes of the violations of the antitrust laws and the Agricultural Fair Practices Act charged here by AMPI.

3. Milk haulers, bottling plants, landlords and any other persons who entered into normal business relationships with NFO and its members in their marketing of milk did not thereby conspire or combine with NFO in violation of the Sherman Act or the Agricultural Fair Practices Act.

4. AMPI failed to carry the burden of proving that the purpose behind NFO's dairy program was to eliminate competition.

5. NFO's marketing the milk of farmers who had previously been marketing to or through AMPI, regardless of how it was accomplished, had the effect of enhancing competition and is wholly consistent with the policy and purposes of the Sherman Act.

6. NFO's selling milk in Order 30 at prices below CMPC's enhanced competition in the sale of milk and was wholly consistent with the policy and pruposes of the Sherman Act.

7. NFO's procurement of USDA qualification as a milk marketing association under the Agricultural Marketing Agreement act, regardless of how it was accomplished, had the effect of enhancing competition in federal order markets and was wholly consistent with the policy and purposes of the Sherman Act.

8. AMPI failed to carry the burden of proving that NFO's claim of tax exemption under Section 501(c) of the Internal Revenue Code resulted either in a reduction in taxes or some other financial benefit to NFO so that it is apparent that NFO's tax exemption claim cannot be the basis for finding a violation of the Sherman Act.

9. AMPI failed to carry the burden of proving that any of NFO's conduct violated Section 1 of the Sherman Act.

10. AMPI failed to carry the burden of proving that NFO coerced or intimidated any AMPI members to breach or ter-

minate any agreements they may have had with AMPI and thereby violated the Agricultural Fair Practices Act.

11. AMPI failed to carry the burden of proving that NFO knowingly made or knowingly permitted any employee or agent to make any false reports about AMPI's finances, management or activities and thereby violated the Agricultural Fair Practices Act.

12. We need not and do not reach the question of whether AMPI lacks standing to recover any price reductions on Order 30 Class I milk.

13. AMPI has failed to carry the burden of proving any damages compensable under Section 4 of the Clayton Act or under the Agricultural Fair Practices Act.

14. AMPI has failed to carry the burden of proving any basis for injunctive relief under Section 16 of the Clayton Act or under the Agricultural Fair Practices Act.

An appropriate order will therefore be entered in regard to Phase III of this case which will direct the Clerk to enter judgment against AMPI in regard to its Phase III counterclaim and in favor of NFO.

ORDERS TO THE CLERK IN REGARD TO THE ENTRY OF JUDGMENTS

Rule 58 of the Rules of Civil Procedure provides in part that "upon a decision by the court . . . that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction of the court." Rule 58 also provides that "every judgment shall be set forth in a separate document" and that "entry of the judgment shall not be delayed for the taxing of costs."

Unless otherwise directed, the Clerk of this Court would routinely enter judgments in this case in accordance with clause (1) of Rule 58 and Form 32 (Judgment on Decision by the Court), as contained in the Appendix of Forms attached to the Rules. That form provides, however, that when it is appropri-

ate that it be "Ordered and Adjudged that the plaintiff take nothing, [and] that the action be dismissed on the merits," it would also be appropriate, under ordinary circumstances, to add a final clause which would provide that "the defendant recover of the plaintiff his costs of action."

Rule 54(d) of the Rules of Civil Procedure and the applicable law make clear that "[t]he allowance of costs to the prevailing party is not obligatory." Section 2668, 10 Wright and Miller, *Federal Practice and Procedure* at 139. Indeed, Section 2667 of the same work points out that "[v]arious circumstances may influence the award of costs in individual cases and result in the prevailing party not receiving costs." 10 Wright and Miller, *Federal Practice and Procedure* at 135. See also the cases cited in footnote 20 on page 35.

Counsel are familiar with this Court's ruling of NFO's Rule 37 motion and its reservation of all questions concerning what sanctions, if any, should be imposed under the circumstances. See Tr. 12, 212, et ff. The question of what costs should be awarded may be related to the final determination of what Rule 37 sanctions may be appropriate under the circumstances. It is therefore appropriate that the determination of all questions relating to costs be deferred for separate and later consideration and that, consistent with Rule 58, the entry of the judgments in this case should not be delayed for the taxing of costs. Appropriate orders will therefore be entered which direct the Clerk to omit any reference to costs from the judgments he shall enter in regard to each of the three Phases of this case.

For the reasons stated, it is

ORDERED (1) that in accordance with Rule 58 of the Rules of Civil Procedure, the Clerk enter separate judgments on separate documents which will reflect the decisions of this Court made and rendered in regard to Phase I, Phase II and Phase III of this case. It is further

ORDERED (2) that each of those separate judgments shall follow the appropriate language of Form 32 in the Appendix to

the Rules of Civil Procedure, except that none of those judgments shall contain any provision for the award or taxing of costs. It is further

ORDERED (3) that the parties shall confer and within twenty (20) days of this order make a joint or separate recommendation to the Court in regard to what procedures they would like to follow in regard to the taxing and award of costs in connection with all three Phases of this case.

/s/ _____
Senior Judge

Kansas City, Missouri
January 29th, 1981

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term 1982

Nos. 81-1235/1236/1237

NATIONAL FARMERS ORGANIZATION, *et al.*,
Appellant/Cross-Appellee,

vs

ASSOCIATED MILK PRODUCERS, INC., *et al.*,
Appellees/Cross-Appellants.

Appeals From The United States District Court For The Western Of Missouri

The Court, having considered petitions for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petitions for rehearing and suggestions for rehearing en banc denied. Judge Ross would grant the petitions.

November 10, 1982

APPENDIX I

II. LEGAL BRIEF RE DAMAGES

A. *Introduction*

NFO's damage claims may be divided into two categories: (1) losses caused by the conspiracy consisting of the amounts by which revenues received by NFO from its members in connection with milk marketing services it renders on their behalf, (membership dues and check-off revenues) and unnecessary expenses incurred by NFO caused by the conspiracy in connection with the marketing services it performs on behalf of its milk producer members (costs of defending litigation brought against NFO pursuant to the conspiracy), and (2) losses consisting of the difference between the prices paid for milk marketed by NFO and the higher prices which would have been paid for that milk but for the conspiracy.

B. *NFO's Standing*

1. Dues, Check-off, and Litigation Expense Losses

The statute which creates a claimant's right to recover money damages for injury caused it by violations of the Federal antitrust laws is Clayton Act §4, 15 U.S.C. §15, which provides as follows:

> That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The term "business or property" is given a practical reading, simply meaning a claimant's economic interest. Thus, even a State, though certainly not a commercial enterprise, can sue to recover damages for injuries to its economic interests which it suffers as a result of violations of the antitrust laws. *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251 (1972). NFO, though a non-profit or-

ganization, is engaged in commercial activities, and is entitled to the protection of the antitrust laws in doing so. See, *e.g.*, *Schwartz* v. *Broadcast Music, Inc.*, 180 F. Supp. 322 (S.D.N.Y. (1959), discussed in some detail below, and *Friends of Animals, Inc.* v. *American Veterinary Medical Assn.*, 310 F. Supp. 1016, (S.D.N.Y. 1970).

* * * * *

Once the fact of injury in some amount is established, a claimant has a great deal of leeway in proving the amount of damages he suffered:

> It is settled law that the courts tend to find some way in which damages can be proved and awarded where a wrong has been committed. Difficulty in ascertaining the amount of damages is not to be confused with the right of recovery.When wrongdoers, by their very actions, make it virtually impossible to prove damages precisely, they should not be heard to complain of the method of proof if the method allowed by the trial court is reasonable under the facts and in the circumstances of the case. *North Texas Producers Assn.* v. *Young*, 308 F. 2d 235, 244-245 (CA-5, 1962).

In short, all that is necessary to prove the amount of damages suffered is sufficient evidence to enable the jury to ascertain the extent of the claimant's damages as a matter of "just and reasonable inference" from the nature of the violation and the claimant's best approximation of the extent of his damages. All that need be offered is "proof of a kind as definite and certain as the subject-matter [admits]". *William H. Rankin Co.* v. *Associated Bill Posters of U.S.*, 42 F. 2d 152, 155, (CA-2, 1930).

D. *Dues and Check-off Losses*

Paragraphs 1 through 72 of the Narrative Statement of Damages set forth a method for measuring the damages resulting from NFO's having been prevented from achieving the growth in its dairy program in the Midwest market which it would have achieved but for the conspiracy.

NFO officials estimate that, but for the conspiracy, NFO would have acquired as members by December 31, 1974, thirty percent of the number of Grade A milk producers selling milk to handlers regulated under twelve of the Federal Milk Marketing Orders within the Midwest market, and that NFO would have, by December 31, 1974, been marketing thirty percent of the milk marketed in those Orders. It is felt that the impact of the conspiracy on NFO's ability to obtain Grade A producer members and market such producers' milk was most strongly felt in these Order markets.

This failure to achieve market penetration has resulted in three kinds of revenue losses to NFO: (1) lost dues which NFO would have collected, (2) lost check-off revenues for milk which NFO would have but did not market, and (3) lost check-off revenues for cull dairy cows and veal calves produced by NFO milk producers which NFO would have but did not market.

The calculations of losses of all three types of revenue are made in the same way. The losses are first divided into two categories, past losses and future losses. Past losses are calculated by first calculating the number of producers (or volume of milk) which NFO would have to have added in each of the years 1970 through 1974 to reach the hypothesized thirty percent market penetration in the relevant Order markets (or, in the case of cull dairy cows and veal calves, in the States of Minnesota and Wisconsin where NFO is most actively engaged in such marketing). It is assumed for purposes of this calculation that such growth would have been achieved in equal increments during the period, this being the most conservative method of estimating how this growth would have occurred. The number of producers whose cull dairy cows and veal calves NFO would have marketed is reduced to reflect the percentage participation in NFO's meat marketing program in Minnesota and Wisconsin by HFO's Grade A milk producer membership in those states. Next the actual number of producers whose

milk NFO marketed in the selected Federal Orders, the actual volumes of milk actually marketed by NFO producers in those Orders, and the actual number of NFO producers in Minnesota and Wisconsin who marketed their cull dairy cows through NFO, respectively, is deducted from the corresponding estimated figures.

* * * * *

Nos. 88-1247 and 88-1248

Supreme Court, U.S.
FILED
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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASSOCIATED MILK PRODUCERS, INC. and
MID-AMERICA DAIRYMEN, INC.,
Petitioners,

v.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,

v.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

OPPOSITION BRIEF OF THE NATIONAL FARMERS' ORGANIZATION, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 88-1247 and 88-1248

ASSOCIATED MILK PRODUCERS, INC. and
MID-AMERICA DAIRYMEN, INC.,
Petitioners,

v.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,

v.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

OPPOSITION BRIEF OF THE NATIONAL FARMERS' ORGANIZATION, INC.

Respondent, The National Farmers' Organization, Inc. (NFO),[1] respectfully opposes the Petitions for Writ of Certiorari filed by Associated Milk Producers, Inc.

---

[1] NFO has no parent or subsidiaries and has the following affiliates: NFO Members' CD&D Corporation; NFO Members' Meat Custodial Account, an Iowa Trust; NFO Members' Dairy Custodial Account, an Iowa Trust; NFO Members' Grain Custodial Account, an Iowa Trust.

(AMPI) and Mid-America Dairymen, Inc. (Mid-Am), and Central Milk Producers Cooperative (CMPC), to review the decision of the United States Court of Appeals for the Eighth Circuit finding that NFO has incurred substantial damages as a result of Petitioners' unlawful acts and remanding the case to the district court for further computation of damages and an award of appropriate attorneys' fees and costs.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *National Farmers' Organization, Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286 (8th Cir. 1988) (*"NFO IV"*) (3a).[2] The district court opinion is reported at *Alexander v. National Farmers' Organization*, 614 F. Supp. 745 (W.D. Mo. 1985) (*"NFO III"*) (65a). The prior Court of Appeals opinion finding that Petitioners had illegally conspired to monopolize Grade A milk marketing and to eliminate competition in the marketing of such milk is reported at *Alexander v. National Farmers' Organization*, 687 F.2d 1173 (8th Cir. 1982), *cert. denied*, 461 U.S. 938, 939 (1983) (*"NFO II"*) (231a). The initial district court opinion is reported at *In re Midwest Milk Monopolization Litigation*, 510 F. Supp. 381 (W.D. Mo. 1981) (*"NFO I"*) (297a).

STATEMENT OF THE CASE

This case and virtually all of the issues urged by Petitioners are before this court for the second time. Nearly eighteen years after the beginning of this case, it is now conclusively established that Petitioners, sellers of raw milk, engaged in a widespread antitrust conspiracy to eliminate competitive milk sellers, including NFO, and that Petitioners' conspiratorial conduct injured NFO. *NFO II*, 687 F.2d 1173 (231a); *NFO IV*, 850 F.2d

[2] Parallel citations to the printed Appendix will be in parentheses, e.g. "(3a)".

1286, 1312 (57a). In 1983 Petitioners sought certiorari to overturn the determinations of liability and injury, arguing essentially that NFO lacked standing under *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), that the proof on relevant market was insufficient and that the Court of Appeals had improperly invaded the fact-finding province of the district court. Certiorari was denied. 461 U.S. 938, 939 (1983).

When the case was remanded to the district court for a computation of damages, that court determined that despite this Court's commands in cases such as *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), NFO had not provided any evidence from which any amount of damages could be estimated. *NFO III*, 614 F. Supp. 745 (65a). On appeal, however, the Court of Appeals held: (1) the district court used an inappropriate legal standard—requiring too high a degree of certainty—in rejecting NFO's damage evidence as insufficient; and (2) the evidence adduced by NFO satisfied the legal requirements of *Zenith* and thus provided an acceptable basis for estimating NFO's damages. *NFO IV*, 850 F.2d 1286 (3a). In so holding, the Eighth Circuit pointed out that AMPI had engaged in widespread destruction of relevant evidence, which would entitle the courts to draw adverse inferences on damage measurement and other issues in favor of NFO. *NFO IV*, 850 F.2d at 1307-1308 (46a).

The Court of Appeals concluded:

> "review of the record and our prior opinion establishing the fact of injury leave this court with a definite and firm conviction that the amount of damages suffered by NFO as a result of the illegal conspiracy was substantial. The record simply will not support a finding that NFO was entitled to only nominal damages."

850 F.2d at 1308 (47a). On remand, the Eighth Circuit has instructed the district court to use NFO's "test market" or "yardstick" damage figure as a starting point. That figure may be reduced by certain amounts specified in the Eighth Circuit's opinion. Additional adjustments are to be considered in accordance with guidelines prescribed by the Court of Appeals. 850 F.2d at 1313 (58a).

Petitioners now seek certiorari on grounds which largely parallel the arguments embodied in their certiorari petitions rejected in 1983.

REASONS THE WRITS SHOULD BE DENIED

I. THE "BURDEN OF PROOF" ISSUES ARE ILLUSORY AND UNWORTHY OF CERTIORARI

Recognizing the futility of seeking certiorari merely to review the facts in a particular case, Petitioners seek to transform their case and fact-specific appeal into a legal issue. They argue that the Court of Appeals adopted an incorrect standard of proof in its discussion of the "amount" of NFO's damages. *See* AMPI—Mid-Am Petition at 10-13. More specifically, Petitioners charge that the Court of Appeals somehow misread the landmark decisions in which this Court developed the basic distinction in private antitrust litigation between proving the "fact of injury" and the "amount of damages."

The Court of Appeals held that a private plaintiff who has established that it was injured by an antitrust violation "need only present evidence from which the fact finder may make a just and reasonable estimate" of the amount of damage "that is not based on speculation or guesswork . . . ." 850 F.2d at 1293 (14a). Petitioners do not take issue with this holding; they specifically agree with it, *e.g.*, AMPI—Mid-Am Petition at 9, 11, thereby underscoring the insubstantial—indeed, illusory—character of the "issues presented." [3]

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[3] The cynicism of Petitioners' argument about the inadequacy of NFO's damage proof, in view of what was done to conceal the

Emphasizing that "our prior opinion clearly established the fact of injury to NFO," a holding that Petitioners do not challenge, the Court of Appeals concluded that the district court, on remand, had failed to apply the proper standard of proof for determining the amount of damages. 850 F.2d at 1294 (16a). The settled distinction between the proof requirements applicable to the "fact" of damage and those applicable to the "amount" was spelled out by the Court of Appeals in an entirely orthodox discussion in which the opinion cited to and quoted liberally from this Court's controlling decisions. *Id.* at 1292-93 (12a-15a). At one point, the Court of Appeals noted that the fact of injury "must be established by a preponderance of the evidence," while "a lesser standard of proof is applicable to proof of the *amount* of damage . . . ." *Id.* at 1293 (13a). It is this reference to a "lesser standard of proof" that Petitioners would isolate from the Court's extended discussion and have this Court grant certiorari to review.

The fundamental distinction recognized by the Court of Appeals between the requirements for proving the *fact* of damage and proving the *amount* has one of the longest pedigrees in antitrust law. Beginning with *Story Parch-*

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facts here, is apparent. In an effort to frustrate NFO's pursuit of its claims against Petitioners, documents were burned in "admitted bonfires". *NFO II*, 687 F.2d at 1205 (286a). At the beginning of the case, AMPI ordered the destruction of evidence relating to NFO and antitrust issues, which resulted in the removal and burning of boxes and boxes of documents from AMPI's corporate planning headquarters.

Now Petitioners, seemingly unconcerned about this already-adjudicated obstruction of justice, in effect complain that they were unfairly deprived of the benefit of that evidence destruction. By urging this Court to require NFO to prove the amount of damages with unprecedented precision, in the face of this destruction of evidence that might have aided such proof, Petitioners propose a burden that is neither just nor reasonable. If there is ever going to be a worse case than this for this Court to speak to the issue of burden of proof, we cannot imagine it.

ment in 1931, this Court has repeatedly emphasized that an injured antitrust plaintiff, especially in a market foreclosure case such as this,[4] cannot be required to prove the amount of its damages with the precision that is required of its proof of the fact of injury. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-67 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-66 (1931). That is the distinction to which the Court of Appeals referred in its observation about a "lesser standard of proof," an observation that Petitioners would elevate to a matter requiring this Court's review.

Other courts have used much the same language as the Court of Appeals to explain the distinction. Thus, in *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 435 (5th Cir. 1985), the Fifth Circuit noted that "an antitrust plaintiff must prove [the fact of injury] by a preponderance of the evidence," but "[o]nce the fact of damage has been established, plaintiff enjoys a relaxed burden with respect to the amount . . . ." *See also Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1043 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 1753 (1988) ("a lenient burden of proof" in establishing the amount of damages); *Fishman v. Wirtz*, 807 F.2d 520, 550 (7th Cir. 1987) (less "onerous a burden"); *Syufy Enterprises, Inc. v. American Multicinema, Inc.*, 793 F.2d 990, 1003 (9th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987) ("a less stringent standard of proof"); *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1297 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985) ("lesser

[4] ". . . . Trial and appellate courts alike must also observe the practical limits of the *burden of proof* which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market . . . ." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969), emphasis supplied.

quantum of proof" required to prove amount of damages).

Even Justice Powell, in an opinion for four members of this Court (and with which the remainder of the Court did not take issue), has used language very similar to that of the Court of Appeals:

> . . . the plaintiff has the burden of proving the fact of antitrust injury by a preponderance of the evidence . . . . Only when this fact has been proved may a court properly be lenient in the evidence it requires to prove the amount of damages . . . .

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. at 570 (dissenting in part).

If Petitioners' point were well-taken, one would have to conclude that the Antitrust Section of the American Bar Association also has "misread" this Court's decisions. Thus, the Section has characterized the distinction, as did the Court of Appeals, in terms of a lesser burden of proof: ". . . The burden of proving the amount of damages is less than that required for proving the fact of damage . . . ." ABA, ANTITRUST LAW DEVELOPMENTS (SECOND) at 409 (2d ed. 1984). A leading commentator would appear to have fallen into the same error: ". . . once the facts of antitrust injury and of causation have been proven, the plaintiff thereafter has a much lesser burden to establish the monetary extent of that damage . . . ." 10 VON KALINOWSKI, ANTITRUST LAWS & TRADE REGULATION § 115.03[2][b] at 115-25 (1988). *See also id.* § 115.03[1][a] ("a lesser burden of proving the quantum of damages").[5]

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[5] Indeed, Petitioners themselves expressly conceded before the Court of Appeals, in language indistinguishable from the Court's, that a "lesser standard of proof [is] applicable to proof of the amount of antitrust damages sustained by NFO," Petition for Rehearing En Banc at 4, and proceeded to elaborate upon the distinc-

Petitioners' suggestion that the Court of Appeals misapprehended the purport of this Court's decisions and the distinction between proof of injury and damage is strikingly rebutted, moreover, by what the Court actually did with the NFO damage claims. For example, NFO had proffered two methods of estimating its damages: the "test market" and the "market structure" approaches, the latter of which produced a considerably higher damage figure. The Court of Appeals, however, while sustaining the "test market" method of proving the amount of damages, held that "the record will not support NFO's proffered damage computations based on the [alternate] market structure theory. . . ." 850 F.2d at 1292, n.3 (11a). Similarly, the Court: (a) rejected NFO's damage claim predicated upon earlier introduction of a "bargaining expense checkoff" because NFO's supporting evidence "simply lacks sufficient information to form the basis of the award NFO claims," *id.* at 1304 (40a); (b) rejected as inadequately supported by record evidence NFO's claim for "post-relief damages," *id.* at 1305 (41a); and (c) remanded to the district court yet other elements of NFO's claim, *id.* at 1303 (37a), 1305-07 (42a-46a).

Thus, it is clear that the Court of Appeals even-handedly adhered to the settled law that, once the fact of injury has been proved by a preponderance of the evidence, an "antitrust plaintiff need only present evidence from which the fact finder may make a just and reason-

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tion, again in language essentially the same as that used by the Court of Appeals:

> . . . while there generally is a more lenient application of the burden of proof to establish the amount of damages caused by antitrust violations, the burden remains nonetheless to establish by a preponderance of the evidence a causal connection between the defendant's wrongful conduct and the damages claimed . . . .

Id. at 20.

able estimate of the damage that is not based on speculation or guesswork . . . ." *Id.* at 1293 (14a).

In yet another effort to manufacture a "burden of proof" issue, Petitioners assert that the Court of Appeals somehow improperly shifted the burden when it suggested" that Petitioners "should have presented evidence of a proper 'yardstick' for measuring the amount of damages in order to remedy NFO's defective damage theory and evidence . . . ." AMPI and Mid-Am Petition at 14. Even putting aside the transformation of a "suggestion" into a "shift" in the burden of proof, Petitioners fail to explain why the matter would justify devoting the limited resources of this Court to its correction. It would be a ticket for this day and train only.

In any event, the Court of Appeals did not place the burden of proof upon Petitioners. To the contrary, as the opinion of the Court of Appeals makes abundantly clear, the Court held unequivocally that NFO's proof had established that Federal Milk Marketing Order 68 was sufficiently comparable to the "damage" markets to serve as a basis for a "just and reasonable" estimate of NFO's damages. *See* 850 F.2d at 1295-97 (19a-24a). Petitioners seize upon the Court's observation that Petitioners had "offered no reasonable substitute yardstick measurement . . . ." *Id.* at 1296 (21a). But this observation, which Petitioners have extracted from the Court's extended discussion of the adequacy of the test market approach, cannot reasonably be read as a "shifting" of the burden of proof. As the context shows, the Court was commenting upon Petitioners' trial strategy of presenting evidence that had nothing to do with the comparability of Order 68, but which purported to show that NFO had suffered no injury at all. *Id.* at 1296-97 (21a-24a).

Petitioners criticize the Court of Appeals, in this connection, for suggesting that Petitioners "had to bear the risk of uncertainty" in NFO's proof of the amount of its damages. AMPI and Mid-Am Petition at 14. Petitioners

have chosen the wrong target. The proposition in question originated with and is firmly embedded in *this* Court's decisions. As the Court noted in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. at 265:

> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. . . . That principle is an ancient one . . . .

Accord: *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. at 565; *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 566-67.

II. THE "EFFECTS OF LAWFUL COMPETITION" ARGUMENT IS INSUBSTANTIAL

Petitioners' argument concerning the "effects of lawful competition" (AMPI and Mid-Am Petition at 15-18) is simply baffling. The Eighth Circuit recognized the settled rule that antitrust damages are not recoverable if the violations did not contribute materially to them, and remanded the case to the district court to determine whether NFO's damage claim should be reduced to account for any losses resulting from Petitioners' lawful competition. 850 F.2d at 1307 (45a).[6] The Eighth Circuit provided the district court with guidelines to be considered as to whether, or to what extent, any such reduction should be made (*id.*), guidelines drawn directly from this Court's teachings in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981), *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555 (1931) and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

In short, Petitioners are being given the opportunity to litigate on remand the very issue they seek to raise.

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[6] Petitioners carry a significant burden in seeking a damage reduction based on this principle. Litton Systems, Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 823 n.49 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984).

Nonetheless, Petitioners ask this Court to grant certiorari, rather than allow the lower courts to determine whether any reduction in the NFO claim is appropriate.

Petitioners apparently seek to establish a rule that an antitrust victim must exclude all possible alternative causes of his loss, regardless of the fact that the unlawful conduct was a material cause of the loss, or else the victim is entitled to nothing. In other words, Petitioners would urge that the mere presence of some lawful acts means that a damage claim must be completely rejected. Such a rule would utterly vitiate the Clayton Act's damage remedy and, in any case, was squarely rejected in *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. at 114, n.9. *See also Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 143-44 (1968) (White J., concurring) ("The plaintiff need not even show that the illegality was a more substantial cause than any other.") *Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798, 805-06 (1st Cir.) *cert. denied*, 379 U.S. 931 (1964). This Court should not grant certiorari for the mere purposes of reaffirming the *Zenith* rule.

III. NFO, AS A DIRECT COMPETITOR OF PETITIONERS, AND A DIRECT TARGET OF THEIR PREDATORY CONSPIRACY, UNQUESTIONABLY HAS STANDING TO SUE

CMPC, joined by its co-Petitioners, has been arguing for 18 years that NFO lacks standing to sue.[7] Not surprisingly, the argument appears again here, in precisely

[7] At every turn, this preposterous argument has been rejected. CMPC raised an identical standing argument in its unsuccessful 1983 Petition seeking review of *NFO II*. Trying to breathe new life into this moribund argument, CMPC disingenuously refers to Associated General Contractors of California v. California State Council of Carpenters (*"AGC"*), 459 U.S. 519 (1983), as an "intervening decision." (CMPC Pet. at 8.) This is more than slightly inaccurate; *AGC* was the principal basis of CMPC's earlier petition, just as it is here.

the same form (CMPC Petition at 12-18), and it clearly deserves the same response.

It is established that Petitioners engaged in a predatory conspiracy to eliminate their competitors and that NFO, one of their most significant competitors, was a principal target because NFO undercut Petitioners' milk prices. Where Petitioners succeeded in eliminating NFO, as in Chicago, they raised prices. 687 F.2d at 1198-99. As held by both the district court and the Court of Appeals, NFO, as a competitor of Petitioners and a direct target of their conspiracy, unquestionably has standing to sue. 687 F.2d at 1209 (293a-294a); 614 F. Supp at 751 (69a). *See* 2 AREEDA & TURNER, ANTITRUST LAW ¶ 340a (1978) ("such standing is so clear it is seldom challenged . . ."); *TV Signal Co. of Aberdeen v. American Telephone & Telegraph Co.*, 617 F.2d 1302, 1309 (8th Cir. 1980) ("plaintiff has amply demonstrated standing since it was both a competitor and a potential competitor").

The cases upon which Petitioners' standing argument is based—*Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"), and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)—confirm NFO's standing to sue.

In *AGC*, a labor union complained that a contractors' association had coerced third parties to utilize non-union contractors, thereby diverting business from certain unionized contractors and, in turn, indirectly disadvantaging the union. Commenting that the plaintiff's alleged injuries were "unspecified," "remote and obviously speculative" and "indirect," 459 U.S. at 539-40, 545 n.52, the Court held that the union lacked standing to sue. The Court emphasized that "the union was neither a consumer nor a competitor in the market in which trade was restrained" (*id.* at 539), and further, that the union was not "a direct victim of the Petitioners' coercive prac-

tices." *Id.* at 540 n.44. The Court also commented that "denying the union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied." *Id.* at 542.

The instant case is completely different. NFO was both a "competitor in the market in which trade was restrained" and "a direct victim of Petitioners' coercive practices." Petitioners are really saying that NFO's injuries were "indirect" because Petitioners injured NFO by depriving it of member-suppliers and of markets. It is difficult to see how conspirators could directly injure their competitor any way *other* than by cutting the competitor off from suppliers and customers. *See, e.g., Klor's, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959).

Confirming the absurdity of Petitioners' position, the Supreme Court in *AGC* held that the persons whose position was identical to NFO's—contractors from whom business had been diverted as a result of illegal coercion —*would* have been entitled to sue. 459 U.S. at 541. Moreover, denying NFO standing to sue would clearly "leave a significant antitrust violation . . . unremedied," allowing Petitioners to go scot free after successfully choking off competition in a basic food commodity. *AGC*, in short, provides no support for CMPC's position.

Citing *Brunswick*, where the Court denied standing to a plaintiff complaining about losses that it claimed to have suffered because of reduced prices resulting from increased competition, Petitioners claim that NFO has not suffered "antitrust injury," *i.e.*, "injury of the type the antitrust laws were designed to prevent." (CMPC Petition at 15.) The instant case, however, is the reverse of *Brunswick*. NFO was injured by Petitioners' conpiracy to *eliminate* competition, including NFO, in order to *raise* prices. This clearly constitutes "antitrust injury." [8]

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[8] The present case thus does not, as Petitioners claim (CMPC Petition at 18), provide an opportunity for this Court to decide the

IV. THE EIGHTH CIRCUIT FULLY ADHERED TO RULE 52(a)

Petitioners argue that the Eighth Circuit violated Rule 52(a), Fed. R. Civ. P., and engaged in *de novo* review in rejecting the district court's finding that NFO presented no evidence sufficient to support a damage award. AMPI and Mid-Am Petition at 18-23. On the contrary, the Eighth Circuit has scrupulously adhered to the requirements of Rule 52(a) throughout this litigation.

In *NFO II*, where the Court of Appeals reversed the district court's liability findings, it explicitly applied the required "clearly erroneous" test, and specifically noted that, "In looking at the evidence underlying the findings, we do not contemplate a *de novo* review." 687 F.2d at 1199 (273a). In *NFO IV*, the Court of Appeals similarly applied the "clearly erroneous" test and, as mandated by this Court,[9] looked at the evidence as a whole:

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issue left open in *AGC*: "Whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market." 459 U.S. at 540-41 n.44. Here, NFO's injury—resulting from Petitioners' conspiracy to eliminate competition in order to raise prices—goes to the very *core* of antitrust policy. Similarly misplaced is the claim (CMPC Petition at 17) based on *Brunswick* and *AGC* that NFO lacks standing because, as an agricultural cooperative, it tries to achieve higher prices for its members. NFO in this case is *not* seeking to use the antitrust laws to promote higher prices through *lessened* competition, as in *Brunswick*. Instead, NFO has invoked the antitrust laws for the reason they were created: to redress injuries caused by Petitioners' unlawful interference with NFO's right to compete.

[9] In United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), the Court held that "a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

> [T]he district court's . . . finding that NFO offered insufficient proof to recover any damages [is] . . . clearly erroneous
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> * * * *
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> [V]iewed as a whole, the record simply does not support the district court's rejection of NFO's damage evidence in its entirety . . .

NFO IV, 850 F.2d at 1294 (16a), 1303 (37a).

Since the Court of Appeals did purport to apply a straightforward and traditional "clearly erroneous" test, as even Petitioners grudgingly admit, AMPI and Mid-Am Petition at 19, n.10, then what Petitioners are asking for is not the clarification of an important legal issue, but rather that this Court review the record of an eighteen-year-old case that took two years to try and decide whether it concurs in the way the Court of Appeals applied the test to this particular collection of evidence.

There are, in addition, unique circumstances present here which would make the review of this particular case from a Rule 52(a) standpoint of little precedential value. The "findings" to which deference is sought were hundreds of formula "Rejections" of NFO's proposed findings, confessedly devoid of any articulation as to their basis. *NFO I*, 510 F. Supp. at 442, n.28. (419a) These "Rejections" in turn, provided the basis of much of *NFO III*, 614 F. Supp. at 762 (91a), hardly presenting an exemplar of the kinds of findings meriting Rule 52(a) deference.

The presence of any significant Rule 52(a) issue at all is also dubious. The damage evidence was largely composed of statistics compiled by the Federal Government, admissions by Petitioners and undisputed matters of history such as, for example, the fact that NFO, Inc. did achieve a 10.5% market share in the test market. Consequently, the district court's "no damages" holding was simply a general conclusion that, as a matter of law, the evidence, most of its unrebutted, did not provide a reasonable basis for estimating damages.

Moreover, while it reversed the district court, the Court of Appeals did *not* finally resolve all damages-related facts. Instead, even though NFO had been victimized by the widespread destruction of evidence described under Point I, it remanded for further findings on a number of issues, while providing guidance as to the standards that should be applied. This obviously does not reflect *de novo* appellate fact finding. Instead, the Eighth Circuit performed the classic and appropriate appellate functions.

Petitioners' Rule 52(a) argument thus amounts to little more than a quibble over the evidence, a subject completely unsuitable for certiorari review.

V. THE EIGHTH CIRCUIT'S HOLDING THAT ELABORATE RELEVANT MARKET PROOF IS UNNECESSARY FOR PREDATORY HORIZONTAL CONSPIRACIES CREATES NO CIRCUIT CONFLICTS AND RAISES NO IMPORTANT ISSUES FOR REVIEW

In *NFO II*, the Eighth Circuit held that Petitioners had engaged in a predatory horizontal conspiracy to eliminate all competitors in a ten-state region in the Midwest in violation of both § 1 and § 2 of the Sherman Act. The court held that proof of a predatory horizontal conspiracy only requires "a minimal showing . . . as to the product and geographic context of the alleged conspiracy," and that "rigorous" proof of a "relevant market" is not necessary. 687 F.2d at 1193 (260a). According to Petitioners, the failure to require "rigorous" relevant market proof creates a "major conflict among the circuits." (CMPC Petition at 19.)

Of course, the Eighth Circuit *did* require proof of a relevant market. *NFO II*, 687 F.2d at 1193. Thus, the only conceivable issue is whether it required enough proof in the circumstances of this particular case. The benefit of having this Court review the record and embroil itself in the fact-specific issue of whether the Court

of Appeals properly evaluated the relevant market evidence is never explained.

There is, moreover, no conflict among the circuits.[10] Petitioners have simply confused cases arising under the rule of reason with cases involving *per se* illegal conduct. No court has ever required elaborate relevant market proof when faced with the kind of *per se* illegal horizontal predation involved in this case.

A. Petitioners Engaged In Horizontal, Per Se Illegal, Concerted Predatory Practices

The linchpin of Petitioners' entire argument is the repeated but unexplained assertion that Petitioners' conduct constituted a "Rule of Reason conspiracy." (CMPC Petition at 19, 20, 25, 27.) This is nonsense. Petitioners' activities were clearly *per se* illegal. As held in *NFO II*, Petitioners engaged in a horizontal conspiracy using raw predation explicitly intended to eliminate all competition, including NFO, in order to raise prices. The conspiratorial conduct included discriminatory pricing, coercive supply disruptions and bad faith litigation, *NFO II*, 687 F.2d at 1193 (261a-262a), and was found to be "predatory on its face". *Id.* at 1199 (273a).

The characterization of this type of naked, anticompetitive conspiracy as being subject to a "Rule of Reason" defense is remarkable. In fact, the conspiracy found here constituted a classic *per se* Sherman Act violation, drawn straight from the pages of prior unanimous decisions of the Supreme Court. *United States v. General Motors Corp.*, 384 U.S. 127, 145 (1966) ("Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act."); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (group

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[10] In its first time around seeking certiorari, CMPC argued the very same, "conflict in the circuits" point and got not a single vote. 461 U.S. 938. The argument has not improved with age.

boycott involving discriminatory pricing and concerted refusal to deal is *per se* illegal under both §§ 1 and 2 of the Sherman Act); and *United States v. Borden Co.*, 308 U.S. 188 (1939) (criminal conspiracy—involving, incidentally, one of AMPI's constituent cooperatives—to fix prices and eliminate competition).[11] Petitioners' conduct thus required no rigorous relevant market analysis to asses sits competitive significance. It was inherently and intentionally destructive of competition.

B. No Appellate Court Has Ever Required Rigorous Relevant Market Proof In A § 2 Horizontal Conspiracy Case Involving Concerted Predatory Practices Intended To Destroy Competitors

Stretching to create a circuit conflict, Petitioners ignore the facts in the cases. Every appellate decision cited by Petitioners as requiring rigorous relevant market proof involved ordinary rule of reason-type allegations. Some were garden-variety dealer termination claims. The defendants' conduct in these cases had ambiguous competitive significance unless analyzed in a structural setting.[12] On the other hand, rigorous relevant market

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[11] The Court of Appeals referred to Petitioners' activities as "concerted predatory conduct" without affixing the latin label "per se." However, as the court noted (687 F.2d at 1192 n.16 (260a)), "concerted predatory conduct . . . is 'unreasonable' under Section 1 regardless of whether the *per se* label is attached." For example, in *Klor's*, the classic group boycott case, this Court treated the boycott as *per se* illegal without ever actually using the talismanic phrase, *"per se."*

[12] Petitioners cite (CMPC Petition at 20 and n.19) § 2 conspiracy cases in the Third, Fourth, Fifth, Eleventh and D.C. Circuits as requiring relevant market proof. The holdings in a number of these cases are ambiguous at best, reflecting a commentator's observation that "often . . . the [§ 2] conspiracy allegation appears to be no more than an afterthought . . . and it seldom gets the court's attention." 3 AREEDA & TURNER, ANTITRUST LAW ¶ 839 at 358 (1978). Nevertheless, *each* of these cases involved rule of reason-type offenses that would clearly require relevant market proof, even

proof has *never* been required in any case like this one involving horizontal concerted predatory practices revealing on their face a specific intent to destroy all competition and control prices.

This consistent distinction is best expressed in *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926-27 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981):

> [N]o particular level of market power or "dangerous probability of success" has to be alleged or proved in a conspiracy claim where the specific intent to monopolize is otherwise apparent from the character of the actions taken. [Citations omitted.] But where actions are ambiguous, the existence and extent of market power may make the inference of specific intent from conduct more or less plausible. [Citations omitted.]

See SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST at 139-40 (1977); 3 AREEDA & TURNER, ANTITRUST LAW ¶ 839 at 358-59 (1978) ("where the agreements involved would also be held to offend § 1 without the necessity of proving power, the failure to require it for the § 2 conspiracy offense is understandable").

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under § 1. Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 148 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982) (challenged vertical exclusive dealing contracts were "examined under the rule of reason"); American Football League v. National Football League, 323 F.2d 124, 132 (4th Cir. 1963) (joint venture rule of reason analysis focusing extensively upon defendant's business justifications); Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 1348 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) (business tort-type conduct explicitly held subject to rule of reason); Bill Beasley Farms, Inc. v. Hubbard Farms, 695 F.2d 1341, 1343 (11th Cir. 1983) (vertical distribution rule of reason analysis); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957) (vertical distribution rule of reason analysis).

In *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961),[13] as in all other cases involving horizontal, concerted predation, relevant market proof was held unnecessary because the very nature of defendants' conduct established proof of specific intent to monopolize, the key element in a § 2 conspiracy case:

> [W]here the charge is conspiracy to monopolize, the essential element is not the power, but the specific intent to monopolize.
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> * * * *
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> [T]he defendants took concerted action to drive independent non-cooperative linen suppliers out of business. In our opinion this was sufficient to support the conclusion that Petitioners had the specific intent to monopolize.

Id. at 573. *See, also, United States v. Yellow Cab Co.*, 332 U.S. 218, 226 (1947) (use of competition-stifling practices that "have been condemned time and again as violations of the [Sherman] Act"; held: no relevant market required); *United States v. National City Lines*, 186 F.2d 562 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951) (criminal conviction).[14] *Accord*: *United States*

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[13] Petitioners suggest that Karlinsky v. New York Racing Ass'n, 517 F.2d 1010, 1011 (2d Cir. 1975), somehow conflicts with the Second Circuit's earlier *Consolidated Laundries* decision. *Karlinsky*, however, involved no concerted predatory practices as in *Consolidated Laundries* and here, but instead only vague allegations of ambiguous violations, which the court summarily dismissed as frivolous. ("Brevity is dictated by the frivolity of the litigation.") (*Id.*)

[14] Petitioners erroneously suggest (CMPC Petition at 21, n.20) that *National City Lines* was overruled by the Seventh Circuit in Ball Memorial Hospital v. Mutual Hospital Insurance, 784 F.2d 1325 (7th Cir. 1986). However, *National City Lines* was nowhere cited in *Ball Memorial*; more importantly, *Ball Memorial* addressed single firm monopolization and attempted monopolization, *not* a conspiracy to monopolize. CMPC also relies (*id.*) on a district court decision in the Seventh Circuit that purportedly "criticized" *National*

v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 n.23 (1956). Here too, as in *Consolidated Laundries*, there was no ambiguity in Petitioners' concerted action; it was taken for the specific purpose of eliminating NFO and *all* competing milk sellers, for the explicit purpose of raising prices. No appellate court confronting such clear malevolent intent, and concerted horizontal predation, has ever required elaborate relevant market proof in a § 2 conspiracy case.

We would note, moreover, that in any event, the evidence of relevant market and Petitioners' power in this case would more than satisfy any requirements for such evidence even in § 2 rule of reason cases. The Eighth Circuit clearly found raw Grade A milk to be the relevant product market and found the geographic target of the conspiracy to be a "ten-state region" of the Midwest (687 F.2d at 1191, 1193) (208a, 261a). The ten states as revealed in the pleadings are: Wisconsin, Minnesota, Nebraska, Iowa, Illinois, Missouri, Kansas, Oklahoma, Arkansas, and Texas. This is the *same* relevant market alleged by Mid-Am in its original and five amended complaints against NFO, thus constituting a conclusive judicial admisison. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 265 (2d ed. 1972); 9 WIGMORE, EVIDENCE § 2589 (Chadbourn rev. 1981). Further, the Eighth Circuit said that Petitioners "do not deny having . . . significant market power" and that "we . . . are pre-

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City Lines. Tire Sales Corp. v. Cities Service Oil Co., 410 F. Supp. 1222, 1231-32 (N.D. Ill. 1976), *rev'd*, 637 F.2d 467 (7th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). CMPC's citation and discussion of this decision fail to indicate that it was *reversed* by the Seventh Circuit! The Seventh Circuit never dealt with the § 2 conspiracy issues because they were voluntarily withdrawn by the parties. In any event, while suggesting that proof of relevant market should be required where vertical distribution practices are challenged under § 2 of the Sherman Act, the district court recognized that *horizontal* conspiracies did *not* necessitate proof of relevant market. *Id.* at 1232 n.12.

sented with the certainty, on this record, that AMPI, CMPC, and Mid-Am are the major marketers of raw milk produced in the Midwest . . . ." (687 F.2d at 1192.) (259a) The only unresolved question found by the court was the precise level of Petitioners' market shares—a significant issue in § 2 actual, and perhaps attempted, monopolization cases, but irrelevant in § 2 conspiracy cases.

C. The § 2 Relevant Market Requirement Does Not Present An Important Antitrust Issue

As a further reason to deny review, a ruling upon the relevant market question raised by CMPC would be largely unimportant both in this case and in antitrust law generally. As the Eighth Circuit noted, citing *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 463 (1960), the same predatory conspiracies may violate *both* § 1 and § 2 of the Sherman Act, and here, the Eighth Circuit in fact held Petitioners liable to NFO for violating both, through the same predatory conduct. The law is absolutely clear that horizontal, concerted predatory practices, like those of Petitioners in this case, violate § 1 without necessity to prove relevant market. Thus, even if this Court were to grant the petition and review the § 2 conspiracy finding, Petitioners would *still* be fully liable to NFO under § 1.

Professor Areeda, who devotes less than two pages of his eight volume antitrust treatise to § 2 conspiracies, makes the same point:

> Any arrangement that could be considered a combination or conspiracy to monopolize must necessarily also be an unreasonable restraint of trade offending § 1. To be sure, not all § 1 violations would constitute conspiracies to monopolize. But the key point is this: every combination or conspiracy that offends antitrust policy can easily be held to be an unreasonable restraint or trade, without the need for consid-

> ering the additional complexities that flow from using the § 2 monopoly concept. *There is therefore no need whatever to try to define the content of the § 2 conspiracy.* [Emphasis added.]

3 AREEDA & TURNER, ANTITRUST LAW ¶ 839 at 358 (1978). Thus, NFO submits that the § 2 conspiracy issue raised by Petitioners simply does not present a significant antitrust issue worthy of this Court's plenary consideration.

CONCLUSION

For all of the above reasons, AMPI's, Mid-Am's and CMPC's Petitions for writ of Certiorari should be denied.

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No. 88-1247

IN THE

Supreme Court of the United States

October Term 1988

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,

vs.

NATIONAL FARMERS ORGANIZATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY OF CENTRAL MILK PRODUCERS COOPERATIVE TO BRIEF OF NATIONAL FARMERS ORGANIZATION IN OPPOSITION TO PETITION

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I. NFO's Lost Membership Dues And Marketing Fees Damage Claim Does Not Arise "By Reason Of" Injury To Competition In The Market Restrained By Petitioners' Antitrust Violation.

NFO's Opposition Brief ("Br.") is remarkable for its studied avoidance of the terms "membership dues" and "checkoff fees" (NFO II, 293a) and the central issue presented by the CMPC Petition. The question presented by the Petition is not whether a direct competitor and target of Petitioners' conspiracy has standing to sue under §4 of the Clayton Act to recover damages for loss resulting from injury to competition in the market restrained by Petitioners' antitrust violation (Br. at 12). Standing, in such a case, is conceded. The focal issue which the Petition addresses, and NFO avoids, is the nature of the damages which NFO seeks to recover—whether membership dues and marketing fees "damages resulting from NFO's having been prevented from achieving the growth in its dairy program in the Midwest market which it would have achieved but for the conspiracy" [1] are recoverable as antitrust damages where the product market restrained is the sale of raw milk to handlers. (NFO II, 257a, 261a-264a).

NFO's Brief elides the difference, recognized by the Eighth Circuit, between its *member's* competitive injury in the form of "price reduction" damages resulting from Petitioners' "predatory conduct" in forcing NFO to sell milk at reduced prices (NFO II, 292a) and NFO's "lost dues and fees" damages resulting from the derivative adverse effect of the "price reduction" on NFO's ability to attract members because "by virtue of selling at lower prices, NFO may have lost members or, in turn, marketing volume" (NFO II, 292a).

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[1] NFO Legal Brief Re Damages at 1399-1400 (App. I, 607a).

NFO's dues and fees damage claim resulting from its stunted membership growth is not for the lost profits that it would have made as "a competitor in the market in which trade was restrained." *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 539 (1983). (*AGC*). Those "price reduction" damages, the Eighth Circuit held, are not recoverable by NFO but only by the members "because NFO is a nonprofit entity which paid producers the proceeds of its sales efforts after deducting out certain marketing expenses. . . ." (NFO II, 292a).

NFO argues that in *AGC* the Court held that the contractors "whose position was identical to NFO's" would have been entitled to sue (Br. at 13) but fails to note that the damage recovery by the contractors, in that case, would have been for lost profits from "alleged restraints in the market for construction contracting and subcontracting" (459 U.S. at 527) not, as is the case here, for damages in a different "membership market" for the sale of NFO's collective bargaining services.

Finally, there is no danger that denial of a treble damage remedy to NFO for lost membership dues and fees will permit antitrust violators to go unpunished or leave their victims without a remedy. (Br. at 13). There was nothing to preclude the directly affected milk buyers or dairy farmers allegedly injured by Petitioners' "predatory" conduct from suing for injury directly attributable to such conduct.

II. Respondent's Arguments Reinforce The Need To Resolve The Conflict Among The Circuits Concerning Requirement Of Relevant Market Definition In Conspiracy To Monopolize Cases.

NFO seeks to escape from the conflict created by decisions which have dispensed with the proof of a relevant market in §2 conspiracy cases by mischaracterizing the Eighth Circuit's decision as a *per se* case. (Br. at 7). NFO can run but it cannot hide from the decision below. Affirming dismissal of NFO's actual and attempted monopolization claims because NFO had failed to prove a relevant geographic market (NFO II, 259a), the Eighth Circuit specifically relied on *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1971) and its progeny to dispense with any requirement for proof of a relevant market in a §2 conspiracy case. (NFO II, 238a). The Eighth Circuit did not find that Petitioners' conduct was illegal *per se*.[2] Had it done so, reliance on *Consolidated Laundries* would have been superfluous.

NFO must accept the Eighth Circuit's decision for what it is: a departure, with other conflicting circuits, from the Rule of Reason standard that this Court has attempted to fashion over the last several years. Curiously, NFO does not defend the Eighth Circuit's and the conflicting circuits' decisions to dispense with proof of a relevant market in §2 conspiracy cases; neither does it defend the progeny of *Consolidated Laundries*—cases which challenge mergers without consideration of market shares, restraints involving single brand prod-

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[2] NFO's attempt to assert a *per se* theory on appeal after trial as a Rule of Reason case was rejected by the Eighth Circuit. It held, simply that "[Petitioners'] market power is sufficient to render their conduct unlawful even under the rule of reason." (NFO II, 260a, n.16).

ucts, forward integration by manufacturers into distribution, predatory pricing with specific intent to monopolize but no barriers to entry, and new offenses such as joint attempts to monopolize. (Petition at 27.) Instead, NFO defends Petitioners' cases which require proof of a relevant market but distinguishes them from this case on the spurious grounds that this case involves either *per se* conduct, *infra*, or something called "horizontal predatory conduct." (Br. at 18).

This Court long ago abandoned a tyranny of labels to avoid hard economic analysis. This Court has never created a category of conduct called "horizontal predatory conduct," much less one which does not require an analysis of competitive effects in a relevant market. *See, FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460 (1986). (Petition at 25). Moreover, the conduct which NFO labels as "horizontal predatory conduct" in this case involves such conduct as joint petitioning of the United States Department of Agriculture concerning NFO's cooperative qualifications under the Federal Milk Marketing Orders, and responsive "predatory" price cuts by Petitioners to NFO's raw milk sales. None of this conduct can be examined without reference to a properly defined relevant product and geographic market and an assessment of market power within that market.

NFO seeks support for dispensing with the requirement of relevant market definition in a Rule of Reason case by reliance on decisions in other circuits which similarly do not require proof of a relevant market in attempt or conspiracy to monopolize cases. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980), *cert. denied*, 421 U.S. 921 (1981) (citing *Consolidated Laundries* and *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377

U.S. 993 (1964)) (Br. at 19). It is true that the Eighth Circuit's decision in this case and the decisions dispensing with proof of a relevant market in attempt or conspiracy to monopolize cases share the same common misinterpretation of the Sherman Act. Neither attempts to monopolize nor non *per se* conspiracies should be allowed to proceed without proof of a relevant market in which to assess the competitive effect of the antitrust defendant's conduct.

This is particularly true in private treble damage actions where the proper definition of a relevant geographic market is indispensable for measuring damages. In this case, the district court rejected as incredible NFO's expert's testimony on damages. (NFO III, 153a). Petitioners' evidence showed that NFO's membership growth in their proferred relevant "damage" market surpassed their growth in other areas that were unaffected by Petitioners' alleged conduct. (NFO III, 110a). In contrast, NFO's expert improperly compared NFO's performance in one portion (the "test market") of NFO's "relevant market" with its performance in another portion of the same "relevant market" to conclude that there was a difference in NFO's growth allegedly resulting from Petitioners' conduct.

Acceptance of this evidence alone by the Eighth Circuit (after its rejection by the district court) underscores the confusion created by failing to properly define a relevant economic market in a private treble damage action. Common sense and common logic shows the incongruity of adopting as a "test market," performance in a segment of what purports to be a "market" to provide the basis for measuring damages resulting from stunted growth in the remainder of that same "market." If a seller's "market" performance in one part of a geographic area varies substantially from his performance

in a different part of the same area, the geographic area, by definition, is not a "relevant geographic market."

This case thus provides the perfect textbook example for this Court to discuss the need for proof of a relevant market in non-*per se* §1 and §2 conspiracy to monopolize cases to assess market impact. This is also the case and this is the time to address and resolve the conflict among the circuits concerning the requirement of proof of a relevant geographic market in conspiracy to monopolize cases under §2 of the Sherman Act.

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